United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan (WT/DS 184)

RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL FROM THE FIRST SUBSTANTIVE MEETING

September 6, 2000

US RESPONSES TO THE PANEL'S QUESTIONS TO THE US

Question 23. Does the US consider that the Panel is limited by Article 17.6(ii) [*sic.* 17.5(ii)] of the AD Agreement in the consideration of evidence with respect to claims under Article X of GATT 1994?

1. The Panel should first consider the scope of the new evidence referred to in this question. Of all the new evidence offered by Japan in this dispute, the only new evidence cited in Japan's Article X argument (paras 282 - 324) are two news reports of Department of Commerce Secretary Daley's statements to the Congressional Steel Caucus. (JP-19 and JP-20). These are offered to show "partiality" in two instances: the decision to accelerate the investigation (First Submission of Japan, at para. 299) and the adoption of the new critical circumstances policy (id., para. 309). None of the other new evidence that is the subject of the United States' preliminary objections are cited or referred to in any way in Japan's Article X argument.

2. So, the issue is whether the Panel should consider these two press reports -- allegedly showing "partiality" -- in considering Japan's Article X claim. Under Article 17.5(ii) of the Anti-Dumping Agreement, this Panel is to examine this matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." Under Article 17.6(i), in assessing the facts of the matter, this Panel "shall determine whether [the authorities'] evaluation of those facts was unbiased and objective."

3. The Japanese respondents in the underlying antidumping investigation could have submitted these press reports to the administering authority during the course of the investigation, if they thought they were relevant. This would have permitted the Commerce Department to take this information into account in conducting its investigation, and would have permitted the other interested parties to the investigation (including U.S. steel companies) an opportunity to comment and to "have a full opportunity for the defence of their interests" under Article 6.2 of the Anti-Dumping Agreement. The Japanese respondents chose not to do so. At the same time, they did choose to submit a letter in this proceeding and in the companion hot-rolled steel from Brazil case, protesting alleged bias by the Department in the conduct of the anti-dumping investigations, especially with regard to the expedited schedule. *See* U.S. Response to question number one from Japan, concerning the fact that this evidence of alleged bias is on the Department's administrative record.

4. As discussed further below, the very nature of the proceeding under examination by this Panel – an investigation, on an administrative record, by national authorities – means that the administering authorities make their decisions based solely on the facts and evidence presented to them. It also means that the rights of other interested parties to defend their interests depend on their ability to comment on information presented to the authorities during the course of the investigation. *See, e.g.*, Article 6.2 of the Anti-Dumping Agreement. The nature of this proceeding makes it inappropriate for a Panel to consider evidence that was not submitted on the administrative record to the national authorities. Article 17.5(ii) reflects this principle with respect to the Anti-Dumping Agreement, but this principle has also been applied in the context of disputes under the Safeguards Agreement, where there is no "Article 17.5(ii)". *E.g.*, *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India (United States -- Shirts and Blouses)*, WT/DS33/R, Report of the Panel, as modified by the Appellate Body, adopted 23 May 1997, para. 7.21; *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30; *United States – Definitive Safeguard Measures On Imports of Wheat Gluten From The European Communities,* WT/DS166/R, Report of the Panel (July 31, 2000), para. 8.6.

5. That this Panel should disregard extra-record evidence in examining Japan's Article X claim is underscored by the particular claim at issue here. It would defy law and logic for this Panel to find that the authorities' decision was "unbiased and objective", based on the standards of the Anti-Dumping Agreement, but not "impartial" under Article X. This could not have been the intention of those who negotiated the specific provisions applicable to the review of antidumping investigations, Articles 17.5 and 17.6 of the Antidumping Agreement. To the contrary, it would suggest that there is a conflict, with respect to this issue, between the Anti-Dumping Agreement and Article X. In the event of such a conflict, the Anti-Dumping Agreement prevails to the extent of the conflict, under the general interpretive headnote to Annex 1A. Therefore, this Panel should not consider, for purposes of Article X, evidence that could have been presented to the administering authorities during the investigation, but was not.

Question 24. The USDOC has a system for the disclosure of confidential information under administrative protective order. Under that system, are the questionnaire responses of one respondent made available to other respondents in the investigation? If the answer is yes, was such disclosure made in this case, and, if so, when was this disclosure made?

6. Under Commerce's procedure for disclosure of confidential information under administrative protective order ("APO"), the questionnaire responses of one *respondent* are not made available to other *respondents* in the investigation. However, the questionnaire responses of a respondent are made available to other respondents' *representatives* (generally, legal counsel) that are authorized under the APO to receive such information. *See* 19 C.F.R. §§ 351.103, 351.105, 351.304-351.306, and 354.19; *see also* www.ia.ita.doc.gov/apo/index.html. In this case, the representatives for all three Japanese respondents (NSC, NKK, and KSC) were covered by the APO and, therefore, were entitled to receive any questionnaire responses that were filed. For example, the representatives for

NKK were entitled to and did receive the confidential versions of the questionnaire responses of KSC and NSC. *See* Certificate of Service for KSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (Dec. 21, 1998) (APO Version); Certificate of Service for NSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (Dec. 21, 1998) (APO Version).[1] Disclosure of the questionnaire responses was made at the time that the information was filed with Commerce. The USDOC's regulations require that when a respondent files a document, such as a response to a questionnaire, with the Department, it must simultaneously serve that document on all persons on the service list for the proceeding, and must include a certificate to this effect. 19 C.F.R. § 351.303(f).

Question 25. Could the US list the exhibits of Japan it considers should not be accepted by the Panel and mention for each of those exhibits the reason why it should not be accepted?

7. *Affidavit of Daniel L. Porter, Counsel to NKK* (**Exh. JP-28**): The Panel should not accept this sworn testimony by Mr. Porter because it was not presented to the Department during the investigation and thus not made part of Commerce's administrative record, consistent with its domestic procedures. The affidavit includes Mr. Porter's testimony about undocumented, alleged conversations with Commerce officials. It is impossible for the Panel to establish the veracity of these allegations without conducting a mini-trial *de novo* before the Panel, calling the persons involved before it for examination and cross-examination. If these conversations had been important to NKK, it could have submitted evidence of them to the Department during the investigation, so that they could have been analyzed, addressed by the other parties, and made part of the administrative record. Mr. Porter's affidavit also includes testimony about his firm's judgment of the impact on NKK's margin of Commerce's facts available and arm's-length determinations. It is impossible for the Panel to judge the accuracy of these calculations. Moreover, Mr. Porter has not even clearly stated what changes were made to the Department's computer program to calculate these values. Finally, the remainder of Mr. Porter's affidavit constitutes an indiscriminate blend of factual information already on the record with argument, most of which has already been set forth in Japan's first submission. For example, the statement at paragraph 17 of the affidavit that NKK's conversion factor was submitted "within the limits established by USDOC regulations" constitutes argument on a disputed point, yet is presented as if it were fact.

8. *Affidavit of Daniel J. Plaine, Counsel to NSC* (**Exh. JP-46**): The Panel should not accept this sworn testimony by Mr. Plaine for the same reasons for which it should not accept Mr. Porter's affidavit. In particular, the Department notes the indiscriminate blending of fact and argument on disputed points, such as at paragraph 11 regarding what allegedly happened at verification, at

[1] It should be noted that KSC's representatives opted not to receive the confidential versions of the responses of NSC or NKK. *See* Letter from Howrey & Simon to USDOC (Nov. 18, 1998) at 1 (Public Document). In addition, it is the United States' understanding that the representatives for NSC requested not to receive the confidential versions of KSC's questionnaire responses. *See* Certificate of Service for KSC's Response to Sections B, C, and D of USDOC's Anti-Dumping Duty Questionnaire (APO Version).

paragraph 19, where it is not clear what conversion factor, if any, was used in calculating the "actual margins" referred to in that paragraph, and at paragraph 26, where it is apparently assumed that *all* of NSC's home market sales to affiliates were made in the ordinary course of trade.

9. *Affidavit of Robert H. Huey, Counsel to KSC* (**Exh. JP-44**): The Panel should not accept this sworn testimony by Mr. Huey because it was not presented to the Department during the investigation and thus not made part of Commerce's administrative record, consistent with its domestic procedures. The affidavit consists of Mr. Huey's testimony about his firm's judgment of the impact on KSC's margin of Commerce's facts available and arm's-length determinations. It is impossible for the Panel to judge the accuracy of these calculations. Even if we assume that Mr. Huey's firm ran the computer programs accurately -- *i.e.*, in the same way that the Department would have done had it made the assumptions Mr. Huey made (such as the assumption that *all* home market sales to affiliates were in the ordinary course of trade), the fact remains that his testimony constitutes extra-record evidence and may not be considered by the Panel.

10. *Affidavit and Resumes of Edward J. Heiden and John Pisarkiewicz, Statisticians* (**Exh. JP-56**): The Panel should not accept this sworn testimony by Mssrs. Heiden and Pisarkiewicz because it was not presented to the Department during the investigation and thus not made part of Commerce's administrative record, consistent with its domestic procedures. If the Japanese respondents had thought it was important to present their arguments concerning the appropriate statistical test using the testimony of these statisticians, they could perfectly well have done so during the investigation, when that testimony could have been analyzed, addressed by the other parties, and placed on the record. Instead, Japan chose to present this post-determination testimony to the Panel, where the statisticians may not be examined or cross-examined.

11. *Newspaper and Other Articles*: The Panel should not consider the following articles, appended to Japan's First Submission: **Exh. JP-16 through 23, 25 through 27, 32(a) through (e), 33, 36 through 38.** As we explained in our First Submission at paragraph 68, Japan could have, but failed to, put this information on the record during the investigation. Japan cannot now supplement, or belatedly attempt to buttress, that record before the WTO. Indeed, even Japan appears to concede this point, by admitting in its Response to the Preliminary Objections that at least some of its articles are "alternative sources for substantive arguments made during the investigations" (paragraph 26) or sources which "make the same argument" as that made during the investigation (paragraph 27). If material from the record is adequate to make Japan's points, the Panel should insist that only such materials be used. Otherwise, parties in future WTO anti-dumping cases will be given the green light to append to their submissions whatever evidence or facts they think will strengthen points not made as strongly as they would have liked before the investigating authority, during the proceeding. Moreover, Japan now has provided other articles and materials that Japanese producers provided to the USITC which Japan regards as making the some of the same points that it attempts to make before this Panel. The United States has no objection to Japan's substituting documents that make equivalent points but were on the USITC's record.

12. In addition, some of Japan's exhibits challenged by the United States in its first submission were, in fact, on the record before the USITC. In paragraph 24 of the Response of Japan to the Preliminary Objections of the United States of America, Japan provides a chart listing citations challenged by the United States as being extra-record and citations to the administrative record where those documents appeared in the USITC's proceeding. As Japan's first written submission did not provide us with the location of these documents in the administrative record, we apparently missed some of these documents in our search of the record. We thus withdraw our request to have the panel disregard the documents listed in that chart for all the documents except the Paine Webber article,[2] insofar as these documents involve issues concerning the USITC However, **Exh. JP-32(f), JP-34, and JP-35** are all cited in the "Economic Context" portion of Japan's First Submission, at notes 36, 40, and 42. It is unclear to what, if any, of the issues of the case these articles pertain. To the extent that they may concern Commerce issues, the United States would still urge the Panel to disregard them, given that they were not before the Department, and because of the bifurcation of the administrative proceedings, as we explain further in our response to the Panel's question number 41.

13. As to the Paine Webber article,[3] we note that Japan lists its citation as "cited at Respondents' USITC Prehearing Brief, n.127-28." Thus, although Japanese producers made statements to the USITC based on that article, they chose not to provide the article, itself, to the USITC. The article therefore was not part of the record before the authority, and the authority had before it only respondents' representations. As a result, we submit that Japan should not put the article, itself, before this Panel, but it should provide to the panel what it provided to the USITC -- the portion of the text of Respondents' Prehearing Brief

Question 26. The United States changed its policy concerning the timing of determinations of sufficient evidence of critical circumstances to justify taking measures necessary to collect anti-dumping duties retroactively. However, it appears that this change in policy was for all future cases. Could the United States verify whether this is in fact so? Could the United States please clarify the status of USDOC "Policy Bulletins" under US law?

14. Yes, the change in U.S. policy concerning the timing of preliminary critical circumstances determinations set forth in Policy Bulletin 98/4 was for all ongoing and future cases. The Policy Bulletin in question, which is entitled "Change in Policy Regarding Timing of Issuance of Critical

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[2] The articles listed in that chart are: *Preston Pipe & Tube Report* (Nov. 1998) and *Preston Pipe & Tube Report* (Sept. 1998), **Exh. JP-67**; Scott Robertson & Frank Haflich, "U.S. mills lift slab purchases," *American Metal Market* (Feb. 8, 1999), **Exh. JP-32(f)**; Charles Yost, "Thin Slab Casting/Flat Rolling: New Technology to Benefit U.S. Steel Industry," in USITC, *Industry Trade and Technology Review,* 1996 ITC Lexis 428 (Oct. 1996), **Exh. JP-34(b)**; Donald Barnett and Robert Crandall, "Steel Decline and Renewal," in *Industry Studies* (2d ed. Larry Duetsch, ed. 1998), **Exh. JP-35**.

[3] Paine Webber, "Steel: A Gauntlet for All, Rewards for the Select," *Steel Strategies* # 24 (June 1998), **Exh. JP-34(a)**.

Circumstances Determinations," states that "{t}his policy is effective October 7, 1998 with respect to *all ongoing and future investigations*." Exhibit JP-3 (emphasis added). Indeed, the USDOC has applied its revised policy not only in the investigation at issue here, but also in the investigation of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation and in at least three other cases. *See Certain Non-Frozen Apple Juice Concentrate From the People's Republic of China*, 64 Fed. Reg. 61835 (Nov. 15, 1999) (prelim. crit. cir. determ.); *Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 64 Fed. Reg. 60422 (Nov. 5, 1999) (prelim. crit. cir. determ.); *Certain Cut-to-Length Carbon-Quality Steel Plate From Japan*, 64 Fed. Reg. 20251 (Apr. 26, 1999) (prelim. crit. cir. determ.); *Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Japan and the Russian Federation*, 63 Fed. Reg. 65750, 65751 (Nov. 30, 1998) (prelim. crit. cir. determ.).

15. Policy Bulletins are official documents which define or explain the Department's interpretation of law, or method of analysis, of a topic under the antidumping or countervailing duty law. Policy bulletins are publicly available statements of policy, which may be found at the Department's website. *See* www.ia.ita.doc.gov/policy/iapolicy/htm. Under U.S. law, Commerce has the authority to change its policies, either before or during an investigation, as long as it clearly explains the reasoning for the change in position, parties have the opportunity to comment on the new position within the context of specific proceedings, and the new position is consistent with the anti-dumping laws. *See Association Colombiana de Exportadores de Flores v. United States*, 19 F. Supp.2d 1116 (July 20, 1998); *Hoogovens Staal BV v. United States*, 4 F. Supp.2d 1213 (Mar. 13, 1998). Policy Bulletins are particularly useful for providing the public with notice of *general* statements of practice (or change in practice) as developed during the course of administrative proceedings (as compared to *regulations*, which are promulgated less often and require more significant administrative process). However, the Department may similarly make statements of policy in case-specific determinations. In this case, Commerce's change in policy was consistent with the statute and the AD Agreement, and the parties had ample opportunity to comment on and provide evidence pertaining to the new policy within the context of this proceeding.[4]

Question 27. Is the US of the view that a party that impedes the investigation should be treated exactly the same as a cooperating party that fails to provide the requested necessary information with respect to use of facts available? Article 6.8 provides that in all three situations mentioned in Article 6.8, determinations may be made on the basis of facts available. In the event the US considers that the treatment should be different in all three cases, on what basis would the US distinguish between an interested party who "refuses access to" information, "otherwise does not provide" information, or "significantly impedes the investigation"?

16. The treatment of parties in the application and selection of facts available depends upon the situation. For example, with respect to responses to Commerce dumping questionnaires, a party may

[4] *See Preliminary Critical Circumstances Memo,* at 3 **(Exh. US/B-42)**.

be substantially or largely cooperative, as was the case with the Japanese respondents in this case, but may not be cooperative in part, by impeding the investigation, or by refusing access to, or not timely providing, some of the necessary information. As it did in this case, Commerce takes into account those actions, or lack of actions, in determining whether to apply facts available and, if so, whether to take an adverse inference. Thus, whether a party that impedes the investigation should be treated exactly the same as a cooperating party that fails to provide the requested information would depend upon the facts of the case – *i.e.*, to what extent the party impeded the investigation, or failed to provide the requested information and the reasons for that failure, and the extent of the party's cooperation as to the rest of the requested information.

17. In this regard, the U.S. statute, which applies to both USDOC and USITC, breaks the application of facts available into two parts: a determination of whether to apply facts available, and, if this determination is affirmative, whether to use an inference that is adverse to the interests of that party in selecting among the facts otherwise available. 19 U.S.C. § 1677e(a) and (b). The U.S. statute directs the investigating authority to use facts otherwise available where certain circumstances apply, such as whether the party has withheld information, failed timely to provide it, or significantly impeded an investigation. *Id.* § 1677e(a). The statute separately permits the authority to take an adverse inference against a party if the authority finds that the party has failed to cooperate by not acting to the best of its ability. *Id.* § 1677e(b). Thus, our statute does not direct the investigating authority to make distinctions between a party which "refuses access to" information, "otherwise does not provide" it, or "significantly impedes the investigation," in considering whether to apply facts available, and, if so, in considering whether to take an adverse inference.

Question 28. The US seems to suggest that the term "injury" for the purposes of a determination under Article 10.7 of the AD Agreement also includes threat of injury, but that the same term "injury" for a final determination under Article 10.6 of the AD Agreement only relates to current material injury. Can the US please explain this apparent difference in interpretation of that same term?

18. The United States does not mean to suggest this difference in interpretation of the same term. The term "injury," as used in Article 10.6 and applicable, by reference, to Article 10.7 of the AD Agreement, has the same meaning for purposes of both preliminary and final determinations of critical circumstances. Under the definition provided in Article 3, footnote 9 of the Agreement, the term "injury" includes threat of injury "unless otherwise specified." Neither Article 10.6 nor Article 10.7 excludes threat from the definition of the term "injury." Thus, under Article 10.6, a *final* affirmative determination of critical circumstances would be proper if an administering authority finds: (1) that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury *or threat thereof*; and (2) that the material injury *or threat thereof* is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied. Sufficient

evidence of these same factors is also necessary when making an affirmative preliminary critical circumstances determination under Article 10.7.

19. Confusion on this point may have arisen because of the separate and distinct requirements under Articles 10.2 and 10.4 of the Agreement, regarding the retroactive imposition of anti-dumping duties for the period of provisional measures once there is a *final* determination regarding injury (under U.S. law, a final determination of injury issued by the USITC). Under Article 10.2, retroactive duties may only be applied if: (1) there is a final determination of current material injury (but not threat thereof), *or* (2) there is a final determination of threat of injury *and* the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury. Thus, if the final injury determination in this case had been a finding solely of "threat of injury," an additional finding under 10.2 may have been necessary. Additionally, Article 10.4 requires that (except as provided under Article 10.2), where there is no finding of current injury, definitive anti-dumping duties may be imposed only from the date of the determination of threat of injury. However, because the USITC Final Determination in this case *did* indeed find current material injury, these provisions are not applicable here.

Question 29. The US appears to argue that the use of the words "*would cause* injury" in Article 10.6(i) of the AD Agreement suggests that the injury might also lie in the future and thus only be a threat of injury at the time of making the determination. In this line of argument, however, the term "injury" seems to be limited to current material injury and does not appear to include "threat of injury". Can the US clarify its position in this respect in light of its overall argument that unless otherwise specified, the term "injury" means both current material injury and threat thereof?

20. As expressly set forth in Article 3, footnote 9 of the AD Agreement, unless otherwise specified, the term "injury" means both current material injury and threat thereof. The term "*would cause* injury" in Article 10.6(i) is no exception. Because the term "injury" in Article 10.6(i) is not qualified or limited, it must be read to mean "material injury or threat of material injury." Thus, irrespective of the words "would cause," Article 10.6(i) refers to both "injury" and "threat thereof." A contrary reading would be proper only if the provision stated, "would cause injury (but not threat thereof," as it does in Article 10.2.

21. The use of the words "*would cause* injury" clarifies the question to be resolved under Article 10.6(i) and further establishes that the term "injury" in that provision includes threat of material injury. Article 10.6(i) does not impose a general requirement that there be injury to the domestic industry (or a finding of such). Rather, Article 10.6(i) inquires into whether importers had knowledge (or should have had knowledge) that dumping existed and that such dumping "would cause injury." Because the question under Article 10.6(i) relates to knowledge by importers (an imprecise fact), it is appropriate that the inquiry be simply whether the importers knew or should have known that dumping practices "would cause" injury (or threat thereof). In other words, it would be difficult, if not impossible, for importers to know precisely whether dumping was, at that time, causing injury to the domestic industry, or whether it was threatening the industry. Importers

are not expected to know the exact state of the domestic industry (i.e., whether dumping practices are presently threatening the industry or causing current material injury) at a given time. Rather, the question under Article 10.6(i) simply inquires as to whether importers should have been aware that the dumping *would* ultimately cause injury. Thus, although the term "injury" within the Agreement includes both current material injury and threat of injury, the use of the phrase "*would cause*" within Article 10.6(i) actually clarifies that the question is whether importers should have known that the domestic industry *would be injured* (i.e., was being *threatened*) by dumping practices.

Question 30. The Panel understands that in making its critical circumstances determination, USDOC considered it necessary to rely on other information such as newspaper articles and the information contained in the petition because USITC had preliminarily found threat of injury. Why would USDOC feel it needs more information in a case in which USITC finds only threat of injury if, as the US argues, it is clear that the term injury in Article 10.6 of the AD Agreement also includes threat of injury and Article 10.7 of the AD Agreement thus also only requires sufficient evidence of such threat of injury?

22. Article 10.6(i) involves a question of importer knowledge.[5] In cases where the USITC makes a preliminary finding of *current* material injury, under U.S. practice, the Department presumes, based upon the finding of current injury, that importers *knew or should have known* that the dumping would cause injury. However, in instances in which the USITC makes a preliminary finding that the domestic industry is *threatened* with injury as a result of dumping, but is not facing current material injury, the threat of injury may be less apparent to the importers. Thus, where there is a USITC preliminary finding of threat, but no present material injury, the U.S. looks to other evidence in the record to determine whether importers should have known that the dumping was impacting (i.e., threatening) the domestic industry. In this case, the record contained extensive information suggesting importer awareness of injury (or threat thereof), including: (1) the ITC preliminary determination of threat; (2) various national and international news articles and press reports (*e.g.*, the Wall Street Journal, American Metal Market, etc.) discussing massive dumped imports and plummeting domestic prices; (3) the evidence supporting the high margins in the petition; (4) the 101% increase in imports over the short period of time; and (5) the injury information in the petition.

Question 31. The US argues that in US practice there is no difference between the requirement of a "reasonable basis to believe or suspect" and the standard of "sufficient evidence" of the AD Agreement. Can the US further expand on this argument and provide examples from its practice that would support this argument?

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[5] Note that, although Article 10.6(i) directs administering authorities to determine whether "the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury," it does not prescribe a specific method for making such determination.

23. As a practical matter, the Department uses the two phrases interchangeably, as we detail below. Under U.S. law, the phrase "reasonable basis to believe or suspect" in used in several contexts which arise during early stages of anti-dumping or countervailing duty proceedings. For example, the phrase is utilized in the statutory provisions governing determinations of whether to initiate sales-below-cost investigations, determinations of whether to initiate on certain allegations in countervailing duty investigations, and preliminary determinations of whether critical circumstances exist. *See, e.g.,* 19 U.S.C. §§ 1671(e), 1673b(e)(1), 1677b(b). The use of the phrase, "reasonable basis to believe or suspect" does not mean that there is not "sufficient evidence" of the required conditions leading to initiation or preliminary determinations.

24. Thus, where there is a requirement that there be a "reasonable basis to believe or suspect" that a certain condition exists, the Department must find "sufficient evidence" of that condition. This evidentiary requirement is explicit in Department determinations. Most significantly, the Department has consistently determined that the "reasonable basis" standard requires a finding of sufficient evidence, and has used the two phrases interchangeably in the context of preliminary critical circumstances determinations.[6] In addition, the Department has made similar determinations in the context of initiating countervailing duty investigations.[7] Furthermore, the Department's reviewing court, the U.S. Court of International Trade ("CIT"), has addressed this issue on two occasions. In *Huffy Corp. v. United States,* the CIT found that, "{i}n reviewing the record, . . . even if the appropriate statutory standard is applied, plaintiffs failed to present to the ITA *sufficient*

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[6] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea,* 64 Fed. Reg. 60776, 60779 (Nov. 8, 1999) (Section 733(e)(1) of the Act provides that if a petitioner alleges critical circumstances, the Department will determine whether there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise . . . . Based on the recent existence of this order, there is sufficient evidence to determine that there is a history of dumping of the subject merchandise and a history of material injury as a result thereof.) (emphasis added); *Preliminary Determination of Critical Circumstances: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 64 Fed. Reg. 60422, 60423 (Nov. 5, 1999) ("Section 733(e) of the Act provides that the Department will determine that critical circumstances exist if there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping .... The existence of an antidumping order on ammonium nitrate in the EC is sufficient evidence of history of injurious dumping.").

[7] *See, e.g., Notice of Initiation of Countervailing Duty Investigations: Certain Pasta From Italy and Turkey,* 60 Fed. Reg. 30280, 30284 (June 8, 1995) ("The Department does not consider the creditworthiness of a firm absent a specific allegation by the petitioner which is supported by information establishing a reasonable basis to believe or suspect that the firm is uncreditworthy. . . . Because petitioners have not provided sufficient evidence of the Turkish pasta producers' uncreditworthiness, we are not including a creditworthiness allegation in our investigation at this time."); *See Notice of Initiation of Countervailing Duty Investigations: Oil Country Tubular Goods From Austria and Italy,* 59 Fed. Reg. 37965, 37967 (July 26, 1994) ("For the purposes of initiation, in determining whether petitioners have provided sufficient evidence of competitive benefit, the Department will determine whether a petitioner has provided a reasonable basis to believe or suspect that [certain conditions have been met]."); *see also Initiation of Countervailing Duty Investigation: Porcelain-on-Steel Cooking Ware from Spain,* 51 Fed. Reg. 26730 (July 25, 1986) (Department stated that "a simple assertion, such as that made by petitioners . . . does not provide sufficient evidence to support an allegation," and thus, does not provide "reasonable grounds within the meaning of {the Act}.").

evidence to create reasonable grounds to believe or suspect that sales were being made at below cost in the home market." 632 F. Supp. 50, 58 (Mar. 27, 1986) (emphasis added). Additionally, in a recent case, the CIT found that Commerce had not based its determination to conduct a below-cost test on sufficient evidence. The Court explained, "Commerce did not point to the 'reasonable grounds,' if any, it had to suspect . . . below-cost sales . . . . Moreover, {the statutory provisions} define what constitutes sufficient evidence with which to form a reasonable suspicion, and there is not evidence in the Final Results that Commerce relied on the type of information required to form the 'reasonable grounds to believe or suspect' that below-cost sales existed before it initiated the investigation."[8] *RHP Bearings Ltd. v. United States,* 2000 Ct. Intl. Trade LEXIS 95, at 35 (Aug. 3, 2000). In other words, both the Department and the CIT have recognized that where there is a requirement that there be a "reasonable basis to believe or suspect" that a certain condition exists, the Department must find "sufficient evidence" of that condition.

25. It is important to note that, the fact that the phrase "reasonable basis to believe or suspect" is utilized in U.S. law for both initiations of certain types of investigations and preliminary critical circumstances determinations does not mean that the type of evidence for the two types of inquiries is the same. Rather, it merely indicates that, consistent with Article 10.7, the determination may be made at an early stage, prior to the receipt of all potential evidence. In other words, a finding that there is a "reasonable basis to believe or suspect" that certain conditions exist must be based upon sufficient evidence of those conditions for purposes of the particular type of determination at issue. Thus, consistent with Article 10.7, the U.S. statute utilizes the phrase "reasonable basis to believe or suspect" to indicate that preliminary critical circumstances determinations made be made at any time after initiation (*i.e.*,once there is sufficient evidence, but potentially prior to the receipt of all record evidence).

Question 32. On page 10 of its oral statement, Japan quotes from the US first submission that the US acknowledges that "it is recognized that information submitted in a request for initiation is likely to be adverse to the interests of the responding party". Does the US believe that such "likely adverse" information may constitute the sufficient evidence necessary for a determination under Article 10.7 of the AD Agreement? Please explain.

26. Yes. The information contained in a petition *may* constitute sufficient evidence to establish that withholding of appraisement or assessment (or other necessary measures as described by Article 10.7) is necessary. The U.S. agrees that information submitted in a request for initiation is likely, in many cases, to be adverse to the interests of the responding party. It is impossible, however, at

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[8] Note that, the relevant statutory provision (relating to below-cost allegations) details the facts that must be considered for that analysis, but does not discuss the meaning of sufficient evidence in general, nor does it describe the type of evidence to be relied upon. The Statement of Administrative Action ("SAA"), however, does provide guidance on what constitutes "sufficient evidence" for purposes of the COP inquiry. The SAA states, **"{r}easonable grounds" will exist when an interested party provides *specific factual information*** on costs and prices, observed or constructed indicating that sales in the foreign market in question are at below-cost prices." SAA at 163.

initiation, for an investigating authority to know whether the data in the petition are more adverse or more favorable to the respondents than their own data. In fact, in this case, the dumping margins calculated in the petition were actually less than the final dumping margin calculated by the Department for KSC. *Compare Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24329, 24370 (May 6, 1999) (final determ.) *with* Petition for the Imposition of Anti-Dumping Duties: Certain Hot-Rolled Carbon Steel Flat Products from Japan (Sept. 30, 1998) at 21, 21-22 n.33 (Public Version). Nevertheless, although a petition may contain data that are adverse to the interests of the responding party, the data must be based on and supported by the available evidence. Indeed, the petition often reflects *actual* data that are *within the range* of margins for exporters and producers, albeit potentially in the top of the range. As such, the information in a petition may constitute the sufficient evidence necessary for a determination under Article 10.7.

27. It is also important to take note of the purpose and instruction of Article 10.7. In making a determination under Article 10.7, an administering authority is not making a precise finding of dumping and consequent injury. Rather, an administering authority is determining whether there exists sufficient evidence of critical circumstances (i.e., knowledge by importers of the existence of dumping and that such dumping would cause injury, and massive dumped imports within a relatively short period of time) to warrant immediate action - withholding of appraisement or assessment, or other necessary measures. The U.S. would not propose that a final margin of dumping (an extremely precise calculation containing many variables) be calculated based solely upon facts contained in a petition without first providing the respondents with an opportunity to provide their own data. The Agreement does not provide for such. However, Article 10.7 does provide that measures may be necessary after initiation in order to preserve the ultimate anti-dumping remedy. Thus, a petition containing sufficient evidence establishing importer awareness and massive dumped imports over a short period of time that has been scrutinized for accuracy, as was the case here, may properly provide a basis for a preliminary critical circumstances determination under Article 10.7.

Question 33. In paragraph 42 of its first oral statement, Japan refers to the language of Article 2.2 of the Agreement as setting out the mandatory and exhaustive list of methods for determination of normal value. As Japan notes, Article 2.2 prefaces the alternatives set forth (constructed value and third country export price) with the statement that these alternatives shall be applied "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country" or "when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison." Does the US consider that, in this case, there were sales of the like product in the ordinary course of trade, and there was no contention that the particular market situation or the low volume of sales prevented a proper comparison, and that therefore the stated alternatives are not the mandatory and exclusive alternatives for determination of normal value?

28. Yes. The United States does consider that, in this case, even after certain sales to affiliates were eliminated from the home market because they were found to be "not in the ordinary course of trade," other home market sales of the like product which were made in the ordinary course of trade remained.

29. Article 2.1 of the Agreement defines normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The downstream sales of the like product from affiliated resellers to the first unaffiliated buyer for consumption in Japan were made in the ordinary course of trade and clearly come within this definition. No party disputes that the downstream sales in question are of the "like product." Moreover, because these sales are to unaffiliated parties, there is no suspicion of unreliability by virtue of affiliation. Indeed, no party has suggested that the downstream sales are "outside the ordinary course of trade" for any reason.

30. Furthermore, there was no contention that a particular market situation or low volume prevented a proper comparison from being made between these downstream home market sales and the U.S. export sales. Article 2.2 provides that when "there are **no** sales" in the home market meeting the above criteria, the alternative bases for normal value are third country sales or constructed value. Because in this case there are sales meeting the criteria for the preferred option of using home market sales as the basis for normal value for each of the products sold to the United States, the Department was not permitted under the Agreement to reach those secondary alternatives. Thus, the question of whether they are "mandatory and exclusive" secondary alternatives is irrelevant.

Question 34. Suppose that sales were made in the home market to, among others, two customers, one of whom is an affiliated customer, while the other is not. Assume also that the weighted average price of the sales to those two customers is identical. It seems it would be possible, under the US 99.5 percent test, that the sales to the affiliated customer will be disregarded in the determination of normal value, while sales to the unaffiliated customer having the same weighted average price would not be disregarded, if the weighted average price of all sales to all unaffiliated customers were more than 0.5 percent higher than the weighted average price to the affiliated customer. Is this a correct understanding of the implications of the 99.5 percent test in operation? If so, please explain how the US can conclude that sales that are, on average, identically priced may be considered as having been made in the ordinary course of trade when they are made to an unaffiliated customer and outside the ordinary course of trade when made to an affiliated customer?

31. The Panel is correct that, when it applies the 99.5 percent test in the above-described situation, the Department would disregard sales to an affiliated customer whose sales were made at the same weighted average prices as those to an unaffiliated customer which purchased at prices

which were more than 0.5 percent below the weighted average for the group of all unaffiliated customers.[9]

32. As an initial matter, it should be noted that the margin calculation, which is prescribed by the Agreement, operates in the same fashion. Just as affiliated customer sales fail the arm's length test when their prices fall below the weighted-average sales price to all unaffiliated customers, export sales are considered "dumped" when their average prices fall below the weighted-average price of all home market sales used to calculate normal value. The fact that there may exist a single home market price that is identical or lower than the export price does not eliminate the dumping.

33. We do not disregard sales to the unaffiliated company because they are, by definition, made at arm's length and are appropriately considered, along with other arm's-length sales, in determining the normal value of the merchandise. However, because sales to affiliated parties are inherently suspect with respect to the extent to which the prices are based on market influences, the United States presumes that such sales should be disregarded. It could reasonably have disregarded all such sales in the home market, regardless of price levels to affiliates, as Canada and Mexico do, and relied solely on arm's-length sales to unaffiliated parties.

34. The current test is designed to make limited exceptions to this presumption to increase the volume of sales available for comparison and reduce the need to rely on downstream sales. But this purpose must be balanced against the need to avoid undermining an accurate calculation of normal value–which otherwise would be based on prices to unaffiliated customers in the market *as a whole* and in most instances on *average* prices in the market as a whole. Thus, if pricing to an affiliate appears not to understate pricing in the home market *as a whole* (as reflected in average prices to all unaffiliated customers), we can have a sufficient level of confidence that normal values will not be significantly distorted by including these sales.

35. Because there is no requirement that sales to affiliates *ever* be considered in the ordinary course of trade, there is certainly no requirement that such sales be deemed "ordinary" when made at the level of the lowest-priced sale to an unaffiliated party, rather than at the level of the average of sales to unaffiliated parties. The logical extension of such a practice would be to include all sales to affiliates that were priced at the level of the lowest-price sales to an unaffiliated customer. This plainly would allow respondents to distort the normal value by making targeted low-priced sales to an unaffiliated customer and overweighting the low end of the price range to affiliated customers. Normal value could no longer be assumed to reflect arm's-length prices in the market as a whole. Thus, when an affiliate does not pass the test, we simply choose not to deviate from our preference for using downstream sales to unaffiliated customers to avoid possible distortions. Given the

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[9] This situation could occur because the overall weighted average, across all unaffiliated customers, would, by the very nature of an average, include values both above and below that average. Sales to some unaffiliated companies will be characterized by higher-than-average prices, and sales to other by lower-than-average prices. It is possible that the difference between the average and the rate for the lowest-price company will be greater than 0.5 percent, thus producing the situation described above.

inherent concern with respect to the influence affiliation has on pricing, Commerce's interpretation of Article 2.2, through the use of the 99.5% test, is a permissible interpretation.

Question 35. Could the US explain whether, when sales are found to be outside the ordinary course of trade for having failed the 99.5 percent test, the US will in all cases replace those sales to affiliated customers with re-sales by those affiliated customers? If not, what other methodologies may be applied according to the US?

36. In most, but not all, cases, when home market sales are found to be outside the ordinary course of trade because they have failed the 99.5 percent test, the Department will rely on sales to downstream unaffiliated customers, or to downstream affiliated customers that pass the 99.5 percent test. In addition, the Department's regulations, at 19 C.F.R. § 351.403(d), permit it to exclude downstream sales from the normal value calculation if sales to affiliated parties are less than five percent of the total value of the exporter or producer's home market sales. During the investigation, the Department granted requests from both NSC and KSC that they be excused, pursuant to this provision, from reporting small amounts of home market downstream sales. *See Preliminary Determination*, at 64 Fed. Reg. 8296 and *Final Determination* at Comment 12. We also make exceptions when respondents can demonstrate that they are unable to obtain downstream sales information by allowing them to avoid having to report downstream sales.

Question 36. The US argues that if sales to an affiliated customer pass the 99.5 percent test, the prices of all sales to that customer will be used in the determination of normal value. Can the US explain how the fact that the prices of all sales to that affiliated customer are used in the determination of normal value demonstrates the reasonableness of the 99.5 percent test under the AD Agreement?

37. The fact that we use all sales to an affiliate that passes the test demonstrates that the 99.5 percent test has no predictable or necessary effect on the calculated dumping margin. For any given affiliate that passes, there typically will be some products sold to that affiliate at prices less than the average price to unaffiliated customers as well as other products sold at prices higher than the unaffiliated average. The products actually used for comparison purposes – to determine normal value for exported subject merchandise – may in fact be those products sold to the affiliate at lower than average prices. Conversely, when sales to an affiliate are disregarded because the affiliate did not pass the test, the sales disregarded may include some sales of products at higher than average prices that would otherwise have been used for comparison purposes. Thus, application of the 99.5 percent test may increase or decrease normal value. The test does not bias the analysis; it may in fact benefit certain respondents.

38. The fact that all sales to a customer which passes the arm's length test are used in the margin calculation is a natural consequence of the fact that the Department's arm's length test is based on an average which is customer-specific, *i.e.*, it is based on the pricing policies that are the result of relationships between customers. The alternative test proposed during the investigation, on the other hand, was sale-specific; some sales would be deemed affected by the affiliation and others not.

Because affiliation is a relationship between customers and not between products, the focus on a customer-specific outcome is one aspect of the reasonableness of the 99.5 percent test.

39. In addition, the focus on the average price relationships of the affiliated customer is permissible because "averaging" is itself one reasonable way to look at overall pricing behaviour between buyer and seller. In situations involving the sale of multiple products, furthermore, it diminishes the likelihood of data manipulation by "bunching" sales of products to a given customer, providing some products at lower-than-usual prices as compensation for providing other products at higher-than-usual prices.

Question 37. In paragraph 37 of its first oral statement, Japan has proposed an example of what it asserts is bias in the United States 99.5 percent test to determine whether sales to an affiliated customer are outside the normal course of trade. Could the US please comment on this example, with specific reference to how the United States would, under the applicable statutory and regulatory provisions, and its established policies, respond to such a situation.

40. The situation described by Japan is one in which a producer sells to its very profitable affiliate at an unusually high price in order to reduce the profits, and thus the tax liability, of the affiliate. Japan complains that the United States "never takes this situation into consideration," and argues that by not discarding such sales, in which the price is distorted but higher than the market average, the United States' arm's length test is "biased."

41. As an initial matter, Section 773 of the Department's statute and section 351.403(b) of its regulations provide that home market sales can only be used in the calculation of normal value if they are made in the ordinary course of trade. If sales are not made in the ordinary course of trade for some reason other than because of affiliation, they can be excluded for that reason. If a respondent were to demonstrate, for example, that a reported "sale" was merely a token vehicle for a transfer of funds to avoid taxes, the sale might be disregarded.

42. A more usual approach is for respondents simply to report the high-price home market sale as being "ordinary." Commerce would apply its 99.5 percent test, the affiliate to which the higher-price sales were made would pass the test, and these sales would be retained in the database. The retention of such higher-price sales in the home market database, however, in no way constitutes "bias" toward the respondent. Were the Department to disregard higher-price sales to affiliates, it would normally require that the respondent report the downstream sales, which would normally be at even higher prices. In most situations, therefore, the Department's lack of concern with higher-price sales to affiliates may have the effect of reducing margins, compared to the margins that would have resulted from margins based on downstream sales.

43. Nor is the respondent cheated of the benefit it might have had from a comparison to a lower-priced downstream sale. In those infrequent situations where downstream prices are below prices to the affiliated reseller (as when losses are sought to be shifted to the affiliated reseller for tax

purposes), the respondent can simply report the downstream prices in the first place. As noted in paragraph 207 of USG's first submission, Commerce instructs respondents that "if you sold to an affiliate who resold the merchandise, report the affiliate's resales to unaffiliated customers [*i.e.*, home market downstream sales] rather than your sales to the affiliate." Where an affiliated customer resells at a price below its acquisition cost, respondents are free to report those lower downstream sales prices even if the sales to that affiliated reseller would have passed the 99.5 percent test.

Question 38. In paragraph 30 of its oral statement, the US states that "In order to be inconsistent with an international agreement, a domestic law must require actions that are inconsistent with the agreement". Please explain.

44. Japan is arguing that the U.S. statutory provision on critical circumstances is, on its face, inconsistent with the Anti-Dumping Agreement, because it does not explicitly repeat the obligations of the Anti-Dumping Agreement. A statute is not on its face WTO-inconsistent, however, if it permits an interpretation that is WTO consistent. The statute does not have to mimic the words of the relevant agreement. In *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*[10] the Panel found that a law did not mandate GATT-inconsistent action where the language of that law was susceptible of a range of meanings, including ones permitting GATT-consistent action. Indeed, a law that does not mandate WTO-inconsistent action is not, on its face, WTO-inconsistent, even if, as is not the case here, actions taken under that law are WTO-inconsistent. For example, the panel in *EEC -- Regulation on Imports of Parts and Components*[11] found that "the mere existence" of the anti-circumvention provision of the EC's antidumping legislation was not inconsistent with the EC's GATT obligations, even though the EC had taken GATT-inconsistent measures under that provision.[12] The Panel based its finding on its conclusion that the anti-circumvention provision "does not mandate the imposition of duties or other measures by the EEC Commission and Council; it merely authorizes the Commission and the Council to take certain actions."[13]

45. That the U.S. statutory provision on critical circumstances does not specifically address some of the Agreement's criteria for the imposition of retroactive measures does not mean that those criteria are not addressed by the administering authority. The statute does not prevent the Commerce Department from considering those factors -- to the contrary, the Commerce Department's policy specifically recognizes those factors. Therefore, the statute itself is not contrary to the Anti-Dumping Agreement. The same analysis would apply to Japan's challenges to the "captive production" and "all-others" provisions of the U.S. anti-dumping statute.

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[10] Panel Report on *United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 October 1994, BISD 41S/131 ("*U.S. -- Tobacco*").

[11] Panel Report on *EEC -- Regulation on Imports of Parts and Components*, adopted 16 May 1990, BISD 37S/132 ("*EEC -- Parts*").

[12] *Id.*, paras. 5.9, 5.21, 5.25-5.26.

[13] *Id.*, para. 5.25.

QUESTIONS TO BOTH PARTIES

Question 39. Does the US objection under 17.5(ii) AD Agreement have any relevance to the consideration of evidence on Japan's Article X GATT claim, or the "on its face" claims regarding US law?

46. With respect to Japan's Article X GATT claim, please see the U.S. response to question 23 above.

47. With respect to Japan's "on its face" claims, in which the Panel is considering the WTO-consistency of a statute "on its face", and not as applied in a particular investigation, the United States believes that Article 17.5(ii) does not limit the evidence that the Panel may consider with respect to those claims. Japan does not offer this new evidence, however, to support its claim that the U.S. statute is WTO-inconsistent on its face. Rather, most of this evidence – i.e., the press and other public reports and the attorney affidavits – is offered in support of Japan's claim that the application of the law in this particular investigation was WTO-inconsistent. The only exception to this – and the only exception offered by Japan – is the affidavit by so-called "experts" (i.e., statisticians) that the 99.5% test "can be unfair" and can lead to anomalous results. The 99.5% test, however, is not statutory, nor is it regulatory; indeed Commerce specifically declined to incorporate this test into its regulations, because it wanted to leave itself open to considering other "arm's length" tests in the future. Nothing requires the Commerce Department to apply this test in individual investigations. Indeed, the Commerce Department has specifically kept open the possibility that a different approach might be taken in individual investigations, if the 99.5% test produces anomalous results. If the Japanese respondents thought that the evidence of the statisticians was important to show that the 99.5% test operates inappropriately, they had an obligation to present that evidence to the decision-makers. Since they did not, this Panel should not base its examination of this matter on that affidavit.

Question 40. Can the parties clarify their position concerning the acceptance of exhibits that relate to the claim of Japan under Article X GATT 1994? Should such exhibits be admitted even if they were not made available under the appropriate domestic procedures as required by the AD Agreement? Could there be other reasons apart from the requirements of Article 17.5(ii) of the AD Agreement to exclude certain documents submitted by Japan to the Panel?

48. Please see the U.S. response to question 23 above. For the reasons in that response, the exhibits cited by Japan in its Article X argument (JP 19 and 20), should not be considered by this Panel.

49. There are reasons other than Article 17.5(ii) that this Panel should disregard "extra-record" documents submitted to it by Japan. The very nature of the proceeding before this Panel – an investigation, on an administrative record, by national authorities – means that the administering authorities make their decisions based solely on the facts and evidence presented to them. It also

means that the rights of other interested parties to defend their interests depend on their ability to comment on information presented to the authorities during the course of the investigation. *See, e.g.*, Article 6.2 of the Anti-Dumping Agreement. The nature of this proceeding makes it inappropriate for a Panel to consider evidence that was not submitted on the administrative record to the national authorities.

50. The Safeguards Agreement, Article 3, requires that safeguard measures be applied only after an investigation by the national authorities, which includes opportunities for all interested parties to present evidence and views, and respond to the evidence and views of other interested parties. It does not, however, have a provision explicitly limiting a Panel's examination to the facts presented to the national authorities, as does Article 17.5(ii) of the Anti-Dumping Agreement. Nevertheless, in a number of disputes arising under the Safeguards Agreement, panels have emphasized that their review of Members' determinations to take safeguard measures is limited to the evidence used by the importing Members in making its determinations. *E.g., United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India (United States -- Shirts and Blouses)*, WT/DS33/R, Report of the Panel, as modified by the Appellate Body, adopted 23 May 1997, para. 7.21; *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30. Most recently, the Panel in *United States – Definitive Safeguard Measures On Imports of Wheat Gluten From The European Communities*, WT/DS166/R, Report of the Panel (July 31, 2000), para. 8.6, stated that

> With the framework established by the Agreement on Safeguards, it is for the USITC to determine how to collect and evaluate data and how to assess and weigh the relevant factors in making determination of serious injury and causation. It is not our role to collect new data, nor to consider evidence which could have been presented to the USITC by interested parties in the investigation, but was not.

Thus, it is not only Article 17.5(ii) of the Anti-Dumping Agreement, but also the nature of the antidumping investigation itself, that directs that the Panel not consider extra-record evidence.

Question 41. Do the parties consider that documents which were submitted to the USITC but not to USDOC were made available "in accordance with appropriate domestic procedures" and can therefore be considered by the Panel even when those documents are submitted to the Panel with regard to claims concerning determinations made by USDOC? According to the parties, should the Panel consider as relevant this internal US distinction between proceedings before the USITC and USDOC when considering the question of admissibility of evidence under Article 17.5(ii) of the AD Agreement?

51. Under the "appropriate domestic procedures" in U.S. antidumping duty investigations, there are two separate administrative records: one for the investigation of dumping by the Commerce Department and one for the investigation of injury by the U.S. International Trade Commission. With very limited exceptions, information is not shared between the agencies. *See* sections 334 and

777(b) of the Tariff Act of 1930. In conducting its investigation and making its determinations, the Commerce Department relies exclusively on the information presented to it and placed on its administrative record; the same is true of the International Trade Commission. Under U.S. procedures, these administrative records are separate, and are not shared between the two agencies. Therefore, when examining this matter "based upon . . . the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", this Panel should disregard documents that are submitted by Japan concerning determinations made by the Commerce Department if those documents were not put on the Commerce Department administrative record. This is so even if those documents were put on the International Trade Commission administrative record. To do otherwise would be to examine a decision of the Commerce Department based on facts that were not made available to the Commerce Department under its procedures. This would be contrary to Article 17.5(ii).

Question 42. Article 2.3 of the AD Agreement provides that where there is no export price or the export price appears unreliable, the export price "may" be constructed on the basis of the resale price to the first independent buyer, or if the products are not resold to an independent buyer, or not resold in the same condition as imported, on "such other reasonable basis" as the authorities may determine. Assume the word "may" were interpreted to mean that the authority is not required to construct an export price on the basis of the resale price to the first independent purchaser in any case. Please comment, including comment on what other methodology might properly be available if this were a correct interpretation of Article 2.3.

52. The United States agrees with the Panel's suggestion that the use of the word "may" in Article 2.3 may permissibly be construed as meaning that the authority is not *required* to construct an export price on the basis of the resale price to the first independent purchaser in any case. Indeed, as occurred in this case, there are situations where an authority might not construct export price in this manner. For example, as we noted at paragraph 122 of the United States' first submission, Commerce will construct export price in a manner other than on the basis of the resale price to the first independent purchaser, if the value added by the affiliated person is likely to exceed substantially the value of the subject merchandise, when sold to the unaffiliated party. KSC urged that Commerce apply this methodology (the "special rule") to its sales through CSI, but the value added by CSI's further manufacturing did not meet the threshold for application of this rule. Japan did not contest this finding. In addition, as we noted at paragraph 19 of the United States' first submission, Commerce did not construct an export price for the U.S. sales through KSC's affiliate, VEST. Instead, Commerce disregarded those sales altogether, because they accounted for such a small part – less than five percent – of KSC's U.S. sales.

53. Generally, however, Commerce interprets Article 2.3 in a manner causing it to seek to construct export price on the basis of the resale price to the first independent purchaser. This interpretation ensures that the investigating authority will be using sales and prices of the actual products sold to the United States, even though they must be adjusted for costs incurred in further manufacturing and/or resale. Such information is likely to result in a more accurate construction

of the export price, without the problem of searching for surrogate product matches. In addition, this interpretation precludes exporters from manipulating dumping margins by sheltering low-priced sales through their affiliates.

Question 43. Could the parties please clarify their position concerning the degree of cooperation required under Article 6.8 and Annex II of the AD Agreement?

54. Neither Article 6.8 nor Annex II of the AD Agreement addresses the matter of *degree* of cooperation, nor whether that cooperation may be with regard to some or all of the requested information. In fact, the word "cooperate" appears only at the end of paragraph 7 of Annex II, which provides that "if an interested party does not *cooperate* and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable than if the party did *cooperate*." (Emphasis added.) As we explained in response to question 27 above, the U.S. statute breaks the application of facts available into two parts: a determination of whether to apply facts available, and, if this determination is affirmative, whether to use an inference that is adverse to the interests of that party in selecting among the facts otherwise available. 19 U.S.C. § 1677e(a) and (b). With regard to the second part of the statute -- deciding whether to take an adverse inference against a party -- the investigating authority will consider whether the party has failed to cooperate by not acting to the best of its ability to provide the requested information. *Id.* § 1677e(b). This determination of cooperation will depend upon an analysis of all the facts and circumstances of the case. For example, in this case, all three Japanese respondents – NSC, NKK, and KSC – cooperated by timely producing large amounts of information. It was only with regard to part of the requested information that Commerce determined they did not cooperate by not acting to the best of their ability, such that an adverse inference was warranted as to the facts available for that information.

Question 44. What information was submitted to and accepted by the USITC after applicable deadlines?

55. No information was submitted to and accepted by the USITC after applicable deadlines in the investigation. The deadline for submission of factual information was June 3, 1999, the deadline for parties' final comments was June 7, 1999.[14]

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[14] *See* Transcript of May 4, 1999 Hearing at 334 (Statement of Chairman Bragg). (**Exh. US/C-20**) The Proposed Work Schedule (**Exh. US/C-21**) identifies June 3, 1999, as the "[c]losing of the record and final release of data to Parties," and June 7, 1999 as the date "[f]inal comments of Parties due." The USITC notice, pursuant to § 207.21 of its regulations (19 C.F.R. § 207.21, **Exh. US/C-22(a)**), scheduling the final phase of the investigation similarly explained that, "[o]n June 3, 1999, the Commission will make available to parties all information on which they have not had an opportunity to comment [and] [p]arties may submit final comments on this information on or before June 7, 1999." 64 Fed. Reg. 10723 (March 5, 1999) (included as Appendix A of USITC Views, **Exh. US/C-1**). *See also* 19 C.F.R. § 207.30 (closing of record to parties submissions) (**Exh. US/C-22(b)**), 19 C.F.R. § 207.25 (posthearing brief to include information adduced at or after hearing and answers to Commissioner questions) (**Exh. US/C-22(c)**).

Question 45. Is the captive production provision relevant to the USITC's analysis of causation?

56. Article 3.5 of the Antidumping Agreement provides that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping, *as set forth in paragraphs 2 and 4*, causing injury within the meaning of this Agreement" (emphasis added). As a result, all elements of Article 3.2 (volume and effect of prices) and Article 3.4 (impact of dumped imports on the domestic industry) are relevant to an analysis of causation. The captive production provision pertains to the analysis of Article 3.4 factors. When the captive production provision applies, certain of the factors in Article 3.4 (*i.e.*, those considered in determining market share and those affecting financial performance) are considered as they relate to the merchant market as well as to the industry as a whole. The captive production provision therefore is relevant to the USITC's analysis of causation.

57. The captive production provision, itself, however, does not have any special effect on the causation analysis. It is merely a tool used in analyzing some of the factors listed in Article 3.4 to obtain a more complete picture of the affects of dumped imports on the domestic industry as a whole. Using a segmented analysis in this way does not have any particular affect on the causation requirement listed in Article 3.5.

Question 46. Could the parties please comment on the relevance of the Panel's decision in US-Wheat Gluten for the question of the consideration of other factors of injury in this case. Is the standard for consideration of other factors, and non-attribution of injury caused by such other factors to imports, the same in the anti-dumping context as in the safeguards context under the respective WTO Agreements?

58. The *Wheat Gluten* panel's decision, insofar as it addresses the consideration of other factors of injury under the Agreement on Safeguards, is not relevant to this case. The United States has announced its intention to challenge the panel's decision to the appellate body, and, therefore, the Dispute Settlement Body has not adopted the decision. In brief, the *Wheat Gluten* panel wrongly interprets the Agreement on Safeguards, without explicit analysis of the relevant language or history of that agreement, as requiring an authority to "ensur[e] that it was the increased imports alone which were causing *serious* injury."[15] So interpreting the Safeguards Agreement, the *Wheat Gluten* panel held that the extent of injury due to increased imports must be "isolated". This interpretation of the Safeguards Agreement, as the United States will demonstrate before the Appellate Body, is (1) contrary to the ordinary meaning of the terms of Article 4 of the Safeguards Agreement and the context of the relevant provisions, which recognize that increased imports may interact with other factors to cause serious injury, (2) contrary to the negotiating history of the Safeguards Agreement,

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[15] *United States -- Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, Report of the Panel, 31 July 2000,* WT/DS166/R, ¶ 8.151 (emphasis in original).

which shows that the members declined to adopt the causation standard that the *Wheat Gluten* panel views as required, and (3) renders the Safeguards Agreement impracticable of application, as it imposes a requirement that cannot in principle be met in most cases.

59. The United States will, if the Panel so desires, expand upon those arguments in this proceeding. It believes, however, that the Panel should decide this case on the terms and history of the Anti-Dumping Agreement, not on that of the Safeguards Agreement. It should remit consideration of the *Wheat Gluten* panel's decision to the Appellate Body.

60. If the panel, however, decides that it may properly consider the *Wheat Gluten* report, it can only conclude that the reasoning of that decision does not apply to the Anti-Dumping Agreement. The *Wheat Gluten* panel itself did not intend its analysis to provide precedent for interpretation of the non-attribution requirement of the Anti-Dumping Agreement. As that panel noted, "significant differences exist between" the legal context for anti-dumping and safeguards cases.[16] The *Wheat Gluten* panel regarded these differences as limiting the relevance to the Safeguards Agreement of *Atlantic Salmon,*[17] cited in the United States' first written submission herein. That decision interpreted the terms of the parallel non-attribution provision of the Anti-Dumping Agreement's precursor, the Tokyo Round Anti-Dumping Code, and was adopted by the Code Committee Members.

61. Accordingly, it is *Atlantic Salmon*, and not the decision in *Wheat Gluten*, that properly forms the background for this Panel's interpretation of the non-attribution provision of the Anti-dumping Agreement. As that *Atlantic Salmon* panel found, the Code parties did not regard it as requiring an authority to demonstrate that dumped imports be the sole cause of material injury to a domestic industry.[18] Although negotiation of the Anti-Dumping Agreement concluded after the *Atlantic Salmon* decision, the Anti-Dumping Agreement, largely modeled on the Code, does not create a "sole cause" requirement, nor has Japan so argued.

62. Moreover, *Atlantic Salmon* and not *Wheat Gluten* is instructive in the current case because, as the *Wheat Gluten* panel itself noted, price is not listed as a relevant factor required to be considered in an injury determination under the Safeguards Agreement.[19] In contrast, the express obligation to examine price effects that existed under Articles 3:1 and 3:2 of the Tokyo Round Anti-Dumping Code has been continued by Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Japan's arguments in this case concern whether the USITC's analysis of price effects was adequate in view of other factors that it regards as having placed downward pressures on U.S. prices. The *Atlantic*

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[16] *Wheat Gluten*, ¶ 8.142.

[17] *United States–Imposiiton of Anti-dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, Report of the Panel Adopted by the Committee on Antidumping Practices on 27 April 1994* (ADP/87).

[18] *Atlantic Salmon*, ¶¶ 546, 549.

[19] *Wheat Gluten,* ¶¶ 8.109, 8.110.

Salmon decision interpreted the obligation not to attribute to dumped imports injury due to other factors in precisely this context.

63. In particular, in *Atlantic Salmon*, the panel and the United States agreed that there was a factor other than dumped imports that might have put pressure on prices in the U.S. market -- low-cost imports that were not subject to the anti-dumping investigation. The panel held that it was adequate for the USITC to have determined that dumped imports accounted for a large portion of increased imports and played a role in the price decline experienced by the U.S. industry. The panel concluded that "it could not ... reasonably be found that the USITC had attributed to the Norwegian imports effects entirely caused by imports from other supplying countries."[20] As to other asserted factors, the panel held that the USITC's findings established that the increased availability of Pacific salmon "could have had only a limited effect on domestic prices."[21] Similarly, the panel held that the USITC satisfied its obligation to examine other factors in finding that the domestic industry's performance was worse than could be explained by internal industry problems.[22]

64. As is discussed in the United States' first written submission, the USITC's determination in this case, particularly with respect to price effects, parallels the analysis upheld in *Atlantic Salmon*. It would be extremely anomalous to hold that the USITC's determination here violated the Anti-Dumping Agreement because of a panel decision purporting to interpret the Safeguards Agreement. The *Atlantic Salmon* panel held that the non-attribution requirement,

> "did not mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. Rather, it meant that the USITC was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than those imports."[23]

65. As indicated by its use of the term "somehow", the panel was skeptical as to whether the extent of injury due to other factors could be isolated, and the Anti-dumping Agreement does not state that, in its examination of other factors, an authority should do so.

66. Rather, Article 3.5 of the Anti-dumping Agreement sets forth an analysis that follows the *Atlantic Salmon* panel's description closely. First, Article 3.5 states, "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing

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[20] *Atlantic Salmon*, ¶ 557.
[21] *Atlantic Salmon*, ¶ 558.
[22] *Atlantic Salmon*, ¶ 559.
[23] *Atlantic Salmon*, ¶ 555.

injury within the meaning of this Agreement." This sentence is drawn virtually verbatim from Article 3:4 of the Tokyo Round Code. As the *Atlantic Salmon* panel discussed concerning the Tokyo Round Code provision,[24] this sentence, through its cross-reference to the articles setting forth specific factors, requires a specific form of analysis for demonstrating causation.

67. Second, the second sentence of Article 3.5 of the Antidumping Agreement characterizes the required demonstration as establishing "a causal relationship between the dumped imports and the injury to the domestic industry." Thus, the necessary demonstration need not establish that other factors do not also have a causal relationship to the injury.

68. Third, the third sentence of Article 3.5 states that "the authorities shall also examine any known factors other than the dumped imports which at the same time are injury the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports." This provision differs from the Tokyo Round Code only in making explicit what the *Atlantic Salmon* panel stated, namely, that such an examination is required. Article 3.5 does not, any more than the Tokyo Round Code equivalent, specify how such an examination shall be conducted. Rather, it is entirely consistent with the *Atlantic Salmon* panel's conclusion that, in conducting the required analysis of causation factors, an authority must examine other known causes of injury to assure that it has not attributed to dumped imports effects that were due to other causes. Had the negotiators of the Anti-dumping Agreement intended to require the "isolation" of the various causes of injury, and thus a more exacting "standard" for the examination of other causes, they could have done so. Instead, they adopted a provision that was consistent with prior precedent expressly rejecting such a requirement.

69. The United States believes that the *Wheat Gluten* panel should have reached a similar conclusion in its construction of the Safeguards Agreement. The non-attribution provision of that agreement was drawn virtually verbatim from the Tokyo Round Anti-Dumping Code. Accordingly, the United States believes that, properly interpreted, the non-attribution requirements of the Safeguards and Anti-Dumping Agreements are consistent. However, even if the *Wheat Gluten* panel was correct in its interpretation of the Safeguards Agreement, the terms and history of the Anti-Dumping Agreement are so different from those of the Safeguards Agreement, as construed by the *Wheat Gluten* panel, that that panel's analysis cannot be properly applied to determinations under the Anti-Dumping Agreement.

Question 47. When did producers of Japanese steel exit the US market and did imports of Japanese steel start falling? What are lead times for orders of steel from Japan? What are shipments times for steel exports from Japan to the US?

70. Neither annual nor monthly data show Japanese steel exiting the U.S. market over the period of investigation. Dumped imports from Japan were highest in the final quarter of the period of

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[24] *Atlantic Salmon*, ¶¶ 549-551.

investigation, the fourth quarter of 1998. Thereafter they declined significantly.[25] Lead times for Japanese product, including shipment times, "averaged 122 days from Japan in 1996-97 and 113 days in 1998."[26]

[25] Imports from Japan totaled 240,976 short tons in 1996, 548,822 short tons in 1997, and 2,684,756 short tons in 1998. USITC Pub. 3202 at IV-2 (based on official statistics and questionnaire responses). *See* U.S. imports for consumption by source and by month (public portion of confidential memorandum INV-W-124 (June 9, 1999)) **(Exh. US/C- 23)**.

[26] USITC Views at II-11.

Exhibit US/C - 20
Transcript of May 4, 1999 Hearing

CHAIRMAN BRAGG: Thank you, Mr. Barringer. Thank you to staff who participated in this investigation, and thank you to all who participated today. It's been a long day, and we very much appreciate the intensity of the arguments and the patience involved.

Post-hearing briefs, statements, responses to questions, and requests of the Commission, and corrections to the transcript must be filed by May 11, 1999. Closing of record and final release of data to parties is due June 3, 1999. Final comments are due June 7, 1999.

Parties will be contacted later regarding an opportunity to file comments on the Commerce final determinations on Brazil and Russia. Again, thank you to all for your participation. This hearing is adjourned.

(Whereupon, at 6:08 p.m., the hearing was adjourned.)

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Exhibit US/C - 21
Proposed Work Schedule

PROPOSED WORK SCHEDULE

Investigations Nos. 701-TA-384 and 731-TA-806-808 (Final)

Certain Hot-Rolled Steel Products from Brazil, Japan, and Russia

Staff Assigned

Investigator	Jeff Clark (205-3195)
Commodity-Industry Analyst	Charles Yost (205-3432)
Economist	Cindy Cohen (205-3230)
Accountant/Auditor	Justin Jee (205-3186)
Attorney	Peter Sultan (205-3152)
Supervisory Investigator	Vera Libeau (205-3176)

	DATE
Preliminary determinations received from Commerce	**February 19, 1999** (B and J) **February 25, 1999** (R)
Questionnaires:	
Drafts to Supervisory Investigator	**February 19**
To the Commission	**February 22**
Mail	**March 1**
Return	**March 22**
Fieldwork	As needed
Prehearing report:	
Draft to Supervisory Investigator	**April 7**
Draft to Senior Review	**April 14**
To the Commission and Parties	**April 21**
Prehearing briefs of Parties due[1]	**April 28**
Scheduled date for Commerce's final determination	**April 28** (B and J) **May 10** (R)
Prehearing conference	**April 30** **9:30 a.m.**
Hearing	**May 4** **9:30 a.m.**
Posthearing briefs of Parties due[1]	**May 11**
Report to the Commission:	
Draft to Supervisory Investigator	**May 17**
Draft to Senior Review	**May 21**
To the Commission and Parties	**May 27**
Legal issues memorandum to the Commission	**June 1**
Closing of the record and final release of data to Parties	**June 3**
Final comments of Parties due[1]	**June 7**
Briefing and vote (suggested date)	**June 10**
Determination and views to Commerce	**June 18, 1999**

[1] If briefs contain business proprietary information, a nonbusiness proprietary version is due the following business day.

Exhibit US/C - 22

Code of Federal Regulations

a) 19 CFR § 207.21
b) 19 CFR § 207.30
c) 19 CFR § 207.25

CODE OF FEDERAL REGULATIONS
TITLE 19--CUSTOMS DUTIES
CHAPTER II--UNITED STATES INTERNATIONAL TRADE COMMISSION
SUBCHAPTER B--NONADJUDICATIVE INVESTIGATIONS
PART 207--INVESTIGATIONS OF WHETHER INJURY TO DOMESTIC INDUSTRIES RESULTS FROM IMPORTS SOLD AT LESS THAN FAIR VALUE OR FROM SUBSIDIZED EXPORTS TO THE UNITED STATES
SUBPART C--FINAL DETERMINATIONS, SHORT LIFE CYCLE PRODUCTS
Current through August 1, 2000; 65 FR 47238

§ 207.21 Final phase notice of scheduling.

(a) Notice from the administering authority of an affirmative preliminary determination under section 703(b) or section 733(b) of the Act and notice from the administering authority of an affirmative final determination under section 705(a) or section 735(a) of the Act shall be deemed to occur on the date on which the transmittal letter of such determination is received by the Secretary from the administering authority or the date on which notice of such determination is published in the Federal Register, whichever shall first occur.

(b) Upon receipt of notice from the administering authority of an affirmative preliminary determination under section 703(b) or section 733(b) of the Act or, if the administering authority's preliminary determination is negative, notice of an affirmative final determination under section 705(a) or section 735(a) of the Act, the Commission shall publish in the Federal Register a Final Phase Notice of Scheduling.

(c) If the administering authority's preliminary determination is negative, the Director shall continue such investigative activities as the Director deems appropriate pending a final determination by the administering authority under section 705(a) or section 735(a) of the Act.

(d) Upon receipt by the Commission of notice from the administering authority of its final negative determination under section 705(a) or section 735(a) of the Act, the corresponding Commission investigation shall be terminated.

[61 FR 37832, July 22, 1996]

< General Materials (GM) - References, Annotations, or Tables >

19 C. F. R. § 207.21

19 CFR § 207.21

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 19--CUSTOMS DUTIES
CHAPTER II--UNITED STATES INTERNATIONAL TRADE COMMISSION
SUBCHAPTER B--NONADJUDICATIVE INVESTIGATIONS
PART 207--INVESTIGATIONS OF WHETHER INJURY TO DOMESTIC INDUSTRIES RESULTS FROM IMPORTS SOLD AT LESS THAN FAIR VALUE OR FROM SUBSIDIZED EXPORTS TO THE UNITED STATES
SUBPART C--FINAL DETERMINATIONS, SHORT LIFE CYCLE PRODUCTS
Current through August 1, 2000; 65 FR 47238

§ 207.30 Comment on information.

(a) In any final phase of an investigation under section 705 or section 735 of the Act, the Commission shall specify a date on which it will disclose to all parties to the investigation all information it has obtained on which the parties have not previously had an opportunity to comment. Any such information that is business proprietary information will be released to persons authorized to obtain such information pursuant to § 207.7. The date on which disclosure is made will occur after the filing of posthearing briefs pursuant to § 207.25.

(b) The parties shall have an opportunity to file comments on any information disclosed to them after they have filed their posthearing brief pursuant to § 207.25. Comments shall only concern such information, and shall not exceed 15 pages of textual material, double spaced and single-sided, on stationery measuring 8 1/2 x 11 inches. A comment may address the accuracy, reliability, or probative value of such information by reference to information elsewhere in the record, in which case the comment shall identify where in the record such information is found. Comments containing new factual information shall be disregarded. The date on which such comments must be filed will be specified by the Commission when it specifies the time that information will be disclosed pursuant to paragraph (a) of this section. The record shall close on the date such comments are due, except with respect to investigations subject to the provisions of section 771(7)(G)(iii) of the Act, and with respect to changes in bracketing of business proprietary information in the comments permitted by § 207.3(c).

[60 FR 22, Jan. 3, 1995; 61 FR 37832, 37833, July 22, 1996]

<General Materials (GM) - References, Annotations, or Tables>

19 C. F. R. § 207.30

19 CFR § 207.30

END OF DOCUMENT

CODE OF FEDERAL REGULATIONS
TITLE 19--CUSTOMS DUTIES
CHAPTER II--UNITED STATES INTERNATIONAL TRADE COMMISSION
SUBCHAPTER B--NONADJUDICATIVE INVESTIGATIONS
PART 207--INVESTIGATIONS OF WHETHER INJURY TO DOMESTIC INDUSTRIES RESULTS FROM IMPORTS SOLD AT LESS THAN FAIR VALUE OR FROM SUBSIDIZED EXPORTS TO THE UNITED STATES
SUBPART C--FINAL DETERMINATIONS, SHORT LIFE CYCLE PRODUCTS
Current through August 1, 2000; 65 FR 47238

§ 207.25 Posthearing briefs.

Any party may file a posthearing brief concerning the information adduced at or after the hearing with the Secretary within a time specified in the notice of scheduling or by the presiding official at the hearing. No such posthearing brief shall exceed fifteen (15) pages of textual material, double spaced and single sided, on stationery measuring 8 1/2 x 11 inches. In addition, the presiding official may permit persons to file answers to questions or requests made by the Commission at the hearing within a specified time. The Secretary shall not accept for filing posthearing briefs or answers which do not comply with this section.

[61 FR 37832, 37833, July 22, 1996]

< General Materials (GM) - References, Annotations, or Tables >

19 C. F. R. § 207.25

19 CFR § 207.25

END OF DOCUMENT

Exhibit US/C - 23

U.S. Imports for Consumption by source and by month

HR steel (1): U.S. imports for consumption, by source and by month, 1996-98

COUNTRY	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
						Quantity (short tons)							
1996:													
Brazil	19,760	10,279	32,104	15,292	19,573	19,317	15,887	21,257	14,430	16,719	20,915	48,630	254,166
Japan	15,115	22,141	9,728	24,269	12,153	11,148	18,589	17,753	16,672	41,860	9,968	20,062	219,459
Russia	1,876	11,072	3,723	41,744	18,518	38,988	43,519	110,984	53,068	124,878	199,614	163,060	811,041
Subtotal	36,751	43,491	45,555	81,304	50,244	69,453	77,996	149,994	84,169	183,456	230,497	231,755	1,284,665
All other	213,223	140,432	206,735	231,399	276,757	270,736	443,765	410,451	407,592	395,462	501,967	377,141	3,875,659
Total	249,975	183,923	252,290	312,703	327,001	340,189	521,761	560,445	491,759	578,918	732,464	608,896	5,160,325
Total	249,975	183,923	252,290	312,703	327,001	340,189	521,761	560,445	491,759	578,918	732,464	608,896	5,160,325
1997:													
Brazil	46,229	40,745	33,561	33,268	41,230	39,411	37,559	35,754	34,986	21,671	31,368	38,701	436,685
Japan	11,842	8,857	18,287	34,287	21,225	46,053	42,723	46,891	65,137	101,649	54,357	65,096	518,582
Russia	90,781	182,556	201,250	272,888	198,483	159,023	206,599	179,064	139,055	159,947	126,277	68,985	1,984,909
Subtotal	150,852	232,158	253,097	340,423	260,937	246,487	286,881	261,709	239,181	283,667	212,002	172,781	2,940,176
All other	304,148	287,398	229,394	264,021	353,077	314,936	315,372	272,351	232,834	328,585	265,535	250,800	3,418,451
Total	455,001	519,556	482,491	604,444	614,014	561,423	602,252	534,060	472,015	612,253	477,536	423,581	6,358,627
Total	455,001	519,556	482,491	604,444	614,014	561,423	602,252	534,060	472,015	612,253	477,536	423,581	6,358,627
1998:													
Brazil	17,539	30,906	35,850	18,922	35,222	60,941	30,300	69,737	30,112	40,425	71,131	10,376	451,462
Japan	150,460	76,286	87,191	218,490	253,353	125,563	288,822	250,635	285,614	354,316	441,018	100,745	2,632,494
Russia	117,522	225,486	154,232	322,048	256,951	278,813	420,332	459,363	342,036	480,185	684,423	81,140	3,822,531
Subtotal	285,522	332,679	277,274	559,459	545,526	465,317	739,454	779,735	657,762	874,926	1,196,572	192,260	6,906,487
All other	195,584	200,257	287,485	274,864	289,614	371,588	374,572	626,711	443,227	477,343	392,231	347,168	4,280,645
Total	481,106	532,936	564,759	834,324	835,140	836,905	1,114,026	1,406,446	1,100,990	1,352,269	1,588,803	539,428	11,187,131
Total	481,106	532,936	564,759	834,324	835,140	836,905	1,114,026	1,406,446	1,100,990	1,352,269	1,588,803	539,428	11,187,131
1999:													
Brazil	16,480	25,322	49										41,851
Japan	16,072	5,011	10,669										31,752
Russia	10,598	10	22										10,631
Subtotal	43,150	30,343	10,740	0	0	0	0	0	0	0	0	0	84,233
All other	446,035	267,934	415,188										1,129,157
Total	489,185	298,277	425,928	0	0	0	0	0	0	0	0	0	1,213,391
Total	489,185	298,277	425,928										1,213,391

Attachment (

United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan (WT/DS 184)

RESPONSES OF THE UNITED STATES TO QUESTIONS FROM JAPAN FROM THE FIRST SUBSTANTIVE MEETING

September 6, 2000

Question 1. Does the USG believe an authority would ever knowingly leave evidence of bias on the administrative record? If not, does not this mean that evidence of bias will in most cases need to come from extra record evidence?

1. Yes, under U.S. law an authority must leave evidence of bias, or alleged bias, on the record, so long as such evidence is timely and appropriately filed with the Department. Section 351.104(a)(1) of the Department's regulations calls for it to "include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by" it during the course of a proceeding that pertains to the proceeding. Section 351.104(a)(2) provides for Department personnel to return to the submitter documents which contain untimely-filed new factual information and documents which do not meet the requirements with respect to business proprietary information. There is no provision for purging documents from the record on a discretionary basis, because of allegations of bias or for any similar reasons.

2. For example, the respondents in this case and in the companion case on hot-rolled steel from Brazil made a joint public submission on November 13, 1998 protesting the manner in which the Department was conducting the investigation, especially with respect to the expedited schedule for those investigations. The letter alleged that this approach constituted evidence of bias, twice suggesting that the Department's decision to expedite the investigation indicated that it had prejudged the outcome of the investigation. That letter, which was timely and properly filed, remains part of the official record. Japan, however, has not included it in its exhibits for this case. The United States would be glad to provide the Panel with a copy of it, should the Panel request.

3. Finally, this question has no relevance to this dispute. Apart from data on conversion factors (which have no relevance to alleged bias), Japan is not alleging that any evidence whatsover, whether related to alleged bias or not, was improperly excluded from the administrative records in these proceedings. By arguing that evidence of bias would have been improperly excluded from the administrative record, Japan is simply attempting to justify the failure of its companies to submit information for the record during the course of the antidumping duty investigation. If this information had been submitted for the administrative record, it would now be properly before the Panel.

Question 2. Does the USG believe that objective assessment of the facts in DSU Article 11

before the Panel.

Question 2. Does the USG believe that objective assessment of the facts in DSU Article 11 sets forth a broader standard of review than AD Agreement Article 17.6?

4. We do not understand what is meant by a "broader standard of review". The "standard of review" generally refers to the amount of deference that is accorded the national authorities when a Panel reviews their decisions. It is not clear what the "breadth" of that deference means. We note, however, that, in the context of safeguards measures, a number of panels have found that Article 11 does not provide for de novo review of the authorities' decision, and does not provide for review based on facts not made available to the authorities:

> We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue[1]. However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected.[2]

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[1] We recall that in *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear ("US – Underwear")*, (adopted on 25 February 1997, WT/24/R), paras. 7.53-54, a case dealing with a safeguard action under the ATC, the panel reached the conclusions that the standard of review was that established in Article 11 of the DSU and commented on the implications of such standard of review for safeguard measures. See also the Panel Report in *Brazil – Countervailing Duty Proceeding Concerning Imports of Milk Powder from the European Community*, adopted on 28 April 1994, SCM/179: "It was incumbent upon the investigating authorities to provide a reasoned opinion explaining how such facts and arguments had led to their finding.", para. 286.

[2] *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Panel adopted 21 June 1999, WT/DS98/R, para. 7.30.

Question 3. The U.S. oral statement in para 6 indicates that panels must determine whether facts are established properly, yet argues in para 7 that panels are not fact finding bodies. How can the panel fulfill its obligation to determine whether particular facts have been properly established without considering the factual circumstances, and the evidence of those circumstances, through which those facts were established?

5. The procedures used by the United States to establish the facts in this proceeding are clear from the relevant regulations governing the collection of facts and evidence, found at 19 CFR parts 201, 207 and 351, and from the record of the proceeding itself, which details the process of soliciting and accepting information and views from interested parties. Japan has not challenged those procedures. The only information that Japan has alleged was improperly excluded from the administrative record is the information on conversion factors, submitted by NSC and NKK. Although these data themselves are not on the adminstrative record, the fact that they were rejected, and the reasons for their rejection, are on the administrative record for review by this Panel. These data themselves are not relevant to whether facts regarding their untimely submission were properly established. In short, the United States believes that there is no need to rely on extra-record evidence, not presented to the authorities during the investigation, to determine whether the establishment of the facts in this investigation was proper.

Question 4. The U.S. has been quite vocal in its support of the admissibility of amicus briefs in panel proceedings. Since such amicus briefs are by definition facts that were not considered by the authorities, does the U.S. believe that no amicus briefs may be submitted to panels considering anti-dumping measures?

6. Amicus briefs are not "by definition facts that were not considered by the authorities". Japan confuses the appropriateness of considering amicus briefs with the consideration of new facts that were not presented to the authorities during the antidumping investigation. An amicus brief, like the submission of a party, may well present legal and factual analysis based entirely on the facts made available to the authorities during the antidumping investigation. It is not itself a new "fact" any more than Japan's first written submission is a new "fact". Taking into account an amicus brief, therefore, is different from asking this panel to consider new facts that could have been put on the authorities' administrative records, but were not.

Question 5. In its closing statement, the U.S. claims it does not know whether particular "facts available" is adverse or not. Yet in this case, the U.S. determination shows the U.S. believed its choice of "facts available" was sufficiently adverse to teach respondents a lesson. Did the U.S. believe that its choice of "facts available" in this case was adverse or not?

7. As the U.S. explained in its closing statement, an investigating authority can never know for certain that its choice of adverse facts available is truly adverse, because it does not have the

actual information against which to compare its choice of presumably adverse information. This uncertainty is reflected in paragraph 7 of Annex II, which refers to the fact that use of adverse facts available "could," rather than "would" lead to a result which is less favorable to the party than if it did cooperate. Nevertheless, in this case, Commerce's choice of facts available for KSC, NSC, and NKK was presumed to be sufficiently adverse, based on a judgment involving all the facts and circumstances of the case, as to be likely to prevent respondents from obtaining a more favorable result by failing to cooperate.

Question 6. The U.S. statute refers to two types of "facts available" --- with adverse inferences and without adverse inferences. Under the U.S. practices, is it not true that either type of "facts available" could lead to results "less favorable" than the actual information? For "facts available" without adverse inferences, what steps does the USDOC take to ensure that such information is not "less favorable?"

8. As we explained in response to question 5 above, an investigating authority can never know for certain that its choice of adverse facts available is truly adverse, because it does not have the actual information against which to compare its choice of presumably adverse information. Thus, it is theoretically possible that either type of facts available (neutral or adverse) could lead to results less favorable than the unknown, actual information, just as it is theoretically possible that either type could lead to results more favorable. Nevertheless, an examination of all the facts of record can usually give Commerce a fair idea of whether its choice of information is likely to be adverse or neutral.

Question 7. If the information about KSC sales to CSI was so crucial to the investigation, why did USDOC not ask CSI for the information?

9. Commerce did not ask CSI directly for the information, because Commerce properly concluded that KSC had ample means to provide the information from its 50 percent-owned affiliate and because KSC repeatedly told Commerce that CSI would not provide the information and that KSC wished to be excused from providing it. KSC simply failed to employ the means available to it to obtain the information requested by Commerce, and Commerce applied adverse facts available for that failure in a manner consistent with Article 6.8 and Annex II of the Agreement. The administrative record does reflect consideration of the idea that Commerce obtain the CSI information under separate protective order, so that KSC would not have access to it. However, KSC officials advised Commerce at verification that CSI had rejected this idea. *See* Verification Report at 23, Exh. US/B-21/bis.

Question 8. What is the difference between "logical inferences" and "adverse inferences" in the context of determinations about "facts available?"

10. The U.S. statute and practice do not make a distinction regarding these terms and, in fact, do

not talk about "logical inferences." Neither does the Anti-Dumping Agreement. Japan may be recalling the Oral Statement by the European Communities, delivered before the Panel at the Third Party Session on August 23, 2000. At paragraph 7 of its statement, the EC said:

> When selecting "facts available" the investigating authorities may take into account, among other circumstances, the degree of co-operation of the party concerned. If an exporter refuses to provide certain information, it is reasonable to infer that it does so because that information is less favourable than the information contained in the complaint or than the information provided by other exporters. Such inferences are not "punitive". (Footnote omitted.) Indeed, strictly speaking, they are not even "adverse." *They are just logical inferences*, based on the assumed rationality of the exporter's behaviour: a rational exporter would co-operate, if it could expect to obtain a better result by doing so than on the basis of "facts available". (Emphasis added.)

See also the Appellate Body's recent decision in the Canadian Aircraft case, cited at the U.S. First Submission, paragraphs 70 of Part B, as well as U.S. discussion at paragraph 79 of Part B, regarding that case and the taking of a logical inference.

Question 9. Why does USDOC believe the information on NSC/NKK conversion factors was too burdensome to include in the determination once it was provided? Why was this information different from the other types of corrections/clarifications routinely submitted pursuant to the special regulation allowing such submissions seven days prior to verification?

11. Japan's question is based on several misconceptions with respect to the facts of this case.

12. First, the Department did not reject the NSC and NKK conversion factor data because it was "too burdensome to include," but rather because it was first presented long after the reasonable deadlines established for providing this information. If administering agencies were compelled to accept any information, no matter when provided, unless they could demonstrate, on an item-by-item basis, that it was "too burdensome" to incorporate particular data elements into their analysis at that time, the right of such agencies to establish and enforce reasonable deadlines for submission of information requested in questionnaires would be entirely gutted and the law would not be administrable.

13. Second, there is no regulation "allowing such submissions seven days prior to verification." The so-called "Seven-Day Rule," codified at 19 C.F.R § 351.301(b)(1), does not govern the submission of data requested in questionnaires, as the conversion factor data were. Instead, section 351.301(c)(2), regarding questionnaire responses and other submissions made on request,

requires that data requested in questionnaires be submitted by the questionnaire deadline.

14. Third, the conversion factors and their supporting data did not constitute "corrections/clarifications" to information previously timely submitted in response to a questionnaire. Instead, they were entirely new databases that both NSC and NKK had previously maintained were both unnecessary and impossible to provide.

Question 10. Why does USG believe "neutral gap filler" will be information favorable to respondents? Since respondents don't know what information will be used, how could respondents possibly know in advance whether information would be favorable or unfavorable?

15. The Department cannot know for certain, for the reasons explained in the responses to questions 5 and 6 above, whether "neutral gap filler" will be favorable, unfavorable, or neutral to respondents. However, when Commerce chooses such information as facts available (because it is declining or not able to take an adverse inference), it does not do so with the intention of selecting information favorable to respondents. Rather, it does so with the aim of filling in information which is likely neither favorable nor unfavorable, but rather neutral, or approximately what the information would have been, had it been available, as best as Commerce can judge from the record. Nevertheless, it can be said that, if an investigating authority used neutral facts available in all situations, this would put respondents in a position of being able to know that they are likely to be better off if they withheld certain unfavorable information. In Commerce cases, respondents have the greatest incentive to withhold information that is least favorable, or adverse, to them, and Commerce reasonably presumes that is why they did not cooperate in providing the information. Therefore, using neutral facts available - information which is judged to be, to the extent possible, neither favorable nor disfavorable - likely would benefit the respondent in most instances. Though respondents might not know exactly what would be used in lieu of the information withheld, the likelihood that they would benefit by withholding adverse information would increase substantially and result in enormous incentives to withhold information.

Question 11. Why does USG read ADA 6.13 as meaning the authority should provide no assistance to large companies? How does USG reconcile this with the mandatory language in ADA 6.13 that authorities "shall take due account" and "shall provide any assistance practicable?

16. The United States does not read Article 6.13 as meaning that the authority should provide no assistance to large companies. As we stated at paragraph 103 of Part B our first submission, the provision, which includes the phrase, "in particular, with regard to small companies," should be given particular force and effect with regard to small companies. As we pointed out at paragraph 104 of Part B of our first submission, KSC is not a small company. Its sales revenue for fiscal

year 1998 exceeded $9 billion. Nevertheless, if it were appropriate that KSC should be provided assistance in a given situation, Commerce would provide any assistance practicable, as Article 6.13 requires. It was not appropriate or practicable in this case, as we have explained, because KSC did not seek any assistance, but repeatedly requested that it be excused altogether from providing the information. Moreover, as we also explained in our first submission, advising KSC on how to manage its own joint venture was beyond any "assistance" which the Department might have been required to provide.

Question 12. Why does USDOC believe an isolated margin for a single product category, such as used for KSC, is somehow more representative than the average transfer prices for various product categories?

17. The issue was not one of representativeness, because Commerce had already decided that it would take an adverse inference with respect to KSC. It therefore chose a margin which it believed (although it could not know for certain) was likely to ensure that KSC would not benefit by its failure to cooperate, in light of the inference that the missing information was withheld because it was adverse. If the Department had decided not to take an adverse inference with respect to KSC, and instead to apply "neutral gap filler" facts available, it would have looked for a margin that might represent approximately what Commerce could estimate that the non-adverse margin resulting from KSC's constructed export price through CSI, to unaffiliated U.S. purchasers, would have been. (In fact, as may be noted in paragraph 32 of Mr. Huey's affidavit, Exh. JP-44, should the Panel consider that affidavit, KSC's own data suggests that that margin was quite high.) In any event, Commerce would not consider reliable or representative the three average transfer prices which KSC provided for CSI *(see* Exh. US/B-24/bis) because the affiliation between KSC and CSI made these prices suspect. In addition, they were average transfer prices for three very broad product categories, and thus too imprecise to form a basis for comparison to normal values for particular models. It was far more reasonable to look to margins resulting from actual, verified sales by KSC to the U.S., in choosing either "neutral gap filler" or adverse facts available.

Question 13. USG argues that Section 351.301(b)(1) does not apply to data requested in questionnaires. But is not all information collected in an investigation provided pursuant to questionnaires? To what information does the regulation apply?

18. No. Not all information collected in an investigation is provided pursuant to questionnaires. Although most information provided by respondents in investigations is that requested in questionnaires, the domestic industry and importers (neither of which receive questionnaires in antidumping investigations before the Department of Commerce), as well as responding exporters, or even non-selected exporting companies may have factual information they believe the Department should consider in conducting its investigation, including during the verification visits. Rather than creating an exception that swallows the rules governing deadlines for

gathering information that the Department knows it requires for the conduct of the investigation, this provision allows for any parties to submit to the Department, up until a week before verification, additional information of which the Department may not be aware, and which they wish the Department to take into consideration. For example, a party might wish to place on the record a news article providing information on certain costs to be scrutinized at verification.

Question 14. Why does USDOC treat average price levels below 99.5% as outside ordinary course of trade, but treats price levels higher as outside the ordinary course of trade only if the price levels are aberrationally high?

19. DOC's test is designed to allow it to use prices to affiliates in the home market to the extent that those prices will not distort the picture of what is happening in the real, arm's-length, market. We do not consider sales to affiliates that pass the test to be a problem in this respect, because the test indicates that these affiliates are not given favorable treatment due to the affiliation. Thus, in those instances we make an exception to the general rule that sales to affiliates are outside the ordinary course of trade. Moreover, the 99.5 percent test, which has a specific purpose, does not rule out the possibility that a company could demonstrate that its high-priced sales are outside the ordinary course of trade.

20. Furthermore, affiliation between parties taints transactions between them. This "taint" normally would not result in sales prices being higher than the weighted average price to the arm's-length market, but rather lower. The Agreement, in Article 2.1, defines dumping in a similar fashion: merchandise is dumped if it is "introduced into the commerce of another country at less than its normal value." Purchasing subject merchandise, even from an affiliate, at prices significantly higher than average, if anything, may reflect an attempt to compensate for other sales, at below-average prices. Even among affiliates, there are stronger constraints to artificially high prices than to artificially low prices. And in the dumping context, there are incentives to sell to affiliated parties at artificially low prices.

Question 15. Why is it "fair" to test only whether prices are too low?

21. Please see the answer to Question 14 for the affirmative reasons why this test is "fair." Japan's question implies that, by not also finding home-market sales to be "outside the ordinary course of trade" on the basis of above-average prices, the Department in some way prejudices the interests of respondents. Just the opposite is true. Were the Department to also disregard sales to home market affiliates who pay above-average prices, two things would happen. First, respondents would be burdened with reporting downstream sales more frequently, because the current test allows some sales to affiliates to be used in lieu of downstream sales. Second, the downstream sales that would otherwise be used would normally be at even higher prices, possibly resulting in higher margins. Thus, the Department's policy of allowing the use of only sales to affiliates that pass the test is not "unfair" to respondents (indeed, it may benefit them),

but is merely a reflection of the fact that the Department's sole concern is with the much more common phenomenon of below-average price sales to affiliates, due to price manipulation.

Question 16. Can the U.S. clarify its views on the relationship between arm's length transactions and sales in the ordinary course of trade?

22. For a sale to be made in the ordinary course of trade, it normally must be a sale negotiated at arm's length. A sale which is not made at arm's length does not meet this fundamental condition and is thus presumed to have been made outside the ordinary course of trade. Thus, a home market sale which is made between unaffiliated parties is assumed to be in the ordinary course of trade absent some indication to the contrary, whereas a home market sale made between affiliated parties is inherently suspect. Accordingly, the Department will consider a sale to an affiliate to have been made in the ordinary course of trade – or equivalent to an arm's-length sale – only if that affiliate passes its 99.5 percent test and is therefore deemed to have a pricing relationship similar to that of unaffiliated customers.

23. Sales made in the ordinary course of trade, however, are not necessarily identical to sales made at arm's length. A sale made to an unaffiliated party, even if it is at arm's length, may still be outside the ordinary course of trade for other reasons. For example, referencing the non-exhaustive list given at page 834 of the Statement of Administrative Action, such a sale may involve merchandise produced according to unusual product specifications, merchandise sold at "aberrational" prices, or merchandise sold pursuant to unusual terms of sale. By the same token, a sale to an affiliate that "passes" the 99.5 percent test may be determined not to be in the ordinary course of trade for those, or other reasons. In sum, sales which are not made at, or equivalent to, arm's length are only one sub-category of sales not in the ordinary course of trade.

Question 17. Can the USG identify any examples of cases in which it disregarded home market prices as being too high?

24. The United States has not identified any examples of cases in which it was even asked to disregard the home market sales to an affiliated company because they were, on average, so high that the respondent argued that the sales to that affiliate were outside the ordinary course of trade. This is not surprising, given that, as explained in our answer to Question 15, it would not be to a respondent's advantage for the Department to disregard sales made to an affiliate at a high average price, because those sales would be replaced by the affiliate's downstream sales, which would likely be at a higher price.

Question 18. If the average price to affiliated customers is 0.5% below the average price to unaffiliated customers, USDOC considers this evidence that the price has been influenced by the relationship. If so, why is an average price 0.5% higher not also evidence that the price has been influenced? What about an average price 2.5% higher?

25. Prices between affiliated parties at any level are inherently suspect because they are not set according to normal market influences. Nevertheless, for the reasons set forth in the Department's answers to Questions 14 and 15, the Department is not concerned with possible influence of this sort (which is not related to manipulation of the results of antidumping proceedings and probably has little effect relative to using the downstream sales), and therefore retains these sales in the home market database (unless they are shown to be outside the ordinary course of trade for some other reason) in order to lessen the need to resort to a greater extent to downstream sales.

Question 19. Could the USG identify specifically the ways in which it "relied on" or in any way addressed the preliminary USITC assessment of whether there was any current injury?

26. The U.S. assumes that this question pertains to the Department of Commerce's preliminary determination of critical circumstances. The USITC preliminarily found that the U.S. industry was being threatened with material injury by reason of the dumped imports from Japan. The USITC did *not* discuss current injury, nor did they make a finding of such.[3] *See Certain Hot-Rolled Steel Products From Brazil, Japan and Russia - Written Views and Report of USITC Preliminary Determination* (Nov. 1998) *("USITC Views")* **(Exh. JP-8).** In order to determine whether importers knew or should have known that dumping existed and would cause injury, the Department relied, in part, upon the USITC's affirmative finding of threat to the U.S. industry.[4] As the U.S. explained in its First Submission (paragraph 459 of Part B), because Article 10.6 utilizes the term "injury" without qualification, it refers to both injury and threat of injury. Thus, the Department's reliance on the ITC's finding of threat of injury, and on other significant evidence (*see* U.S. First Submission at paragraph 476 of Part B), for purposes of determining importer awareness, was consistent with the Agreement.

Question 20. Does the USG believe that the standard "sufficient evidence" for initiating a case is the same as "sufficient evidence" to justify the extraordinary remedy of critical circumstances?

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[3] To the extent that there is any discussion of current material injury, it is found in Commissioner Crawford's separate determination that the U.S. industry was suffering current material injury by reason of the dumped imports. *See USITC Views*, at 19 **(Exh. JP-8).** In Commissioner Crawford's views, she found that the domestic industry "would have increased its prices, and therefore, its revenues, significantly had the subject imports been fairly traded," and thus, the domestic industry was materially injured as a result of the dumped imports. *Id.* at 26. This is the only discussion in the USITC's preliminary determination relating to current material injury.

[4] Note that the USITC also specifically found threat of material injury resulting from the surge of dumped imports. The USITC stated, "we find that the record reflects a significant increase in the volume of imports in interim 1998 and immediately thereafter, as compared to prior periods, and this increase supports the conclusion that the industry is threatened with material injury in the imminent future." *See USITC Views,* at 15.

27. As the U.S. explained in its First Submission (paragraphs 467-470 of Part B), the "sufficient evidence" standard must be viewed within the context in which it is applied. The type of evidence that is sufficient for purposes of initiation of an anti-dumping investigation may or may not be sufficient for purposes of a preliminary critical circumstances determination. In this case, in making its preliminary critical circumstances determination, the Department of Commerce looked to additional evidence outside of that presented at the time of initiation of the anti-dumping investigation.

Question 21. Beyond the general statement of purpose in the Policy Bulletin, where did USDOC make specific factual findings about the remedial effect of imposing antidumping duties?

28. Because the finding is apparent in the Department's analysis and in the record evidence, a separate, delineated finding was not necessary. Article 10.6(ii) states, "the injury is caused by massive dumped imports of a product in a relatively short time *which in light of the timing and the volume of the dumped imports and other circumstances* (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied. . . ." The Department considered the effect of the timing and volume of the dumped imports. First, the Department determined there was a 101% increase in imports over a short time following the time when importers and exporters became aware that a dumping case was likely, and that the producers accounting for the majority of the imports were dumping. Additionally, the record contained significant information indicating that the surge of dumped imports contributed, or caused, threat to the U.S. industry. For example, the USITC preliminary determination states, "[w]e recognize that petitioners have not specifically alleged that the volume of subject imports during 1995-97 was injurious. However, we find that the record reflects a significant increase in the volume of imports in interim 1998 and immediately thereafter, as compared to prior periods, and this increase supports the conclusion that the industry is threatened with material injury in the imminent future. . . . In our view, these increases in volume and market penetration indicate a likelihood of substantially increased subject imports in the imminent future." *USITC Views,* at 15. Additionally, numerous exhibits in the petition demonstrated that the *surge* of dumped imports was severely impacting the U.S. industry - causing prices to collapse, forcing U.S. producers to cut production and diminishing earnings.[5] This evidence shows that, without some remedial action, the surge of dumped imports

[5] *See, e.g., Metal Bulletin* (Sept. 24, 1998) ("The July figure fully supports our industry's contention that massive levels of steel are being dumped.")**(Exh. US/B-40(c))**; *Morgan Stanley, Dean Witter Industry Report* (July 21, 1998) ("hot-rolled imports are in at a price of . . . 15-20% below the domestic price, and we believe that domestic pricing on these products will break down in later September or early October.")**(Exh. US/B-40(b))**; *Wall Street Journal* at A4 (Sept. 21, 1998) ("Steel imports to the U.S. continued at their record pace in July . . . lost market share has hit the U.S. steelmakers hard, particularly in the last three months as the U.S. industry's pricing power has collapsed. As a result, some steelmakers have cut their production, and analysts are chopping their

was likely to continue and compound the threat to the U.S. industry even further. Because the Department considers these factors in its analysis, it stated in Policy Bulletin 98/4 that the "purpose of [the critical circumstances] provision is to ensure that the statutory remedy is not undermined by massive imports following initiation of an investigation," *see Critical Circumstances Policy Bulletin*, 63 Fed. Reg. 55364 (Oct. 15, 1998)**(Exh. JP-3)**. As such, this factor was fully considered and addressed in the preliminary determination of critical circumstances in this case as set forth above. Because all of the factors in Article 10.6 were fully considered and addressed therein, the preliminary determination was consistent with the Agreement.

Question 22. If the captive production provision seeks only to add an additional relevant factor to be considered, why does the statute say "shall focus primarily" rather than simply saying "shall consider."

29. At the outset, the United States notes that Japan's question is misplaced because the captive production provision does not "add an additional relevant factor to be considered." The relevant factors that the USITC must consider are listed in 19 U.S.C. § 1677(7)(C)(iii), and these factors correspond to the factors listed in Article 3.4 of the Antidumping Agreement. The captive production provision merely requires the USITC, when considering certain of these listed factors, to examine the merchant market segment as a step in considering injury to the industry.

30. The statute directs the USITC's attention specifically to the merchant market segment because it is there that evidence of injury by reason of dumped imports would be most readily apparent. From there, the statute then requires the USITC to consider the effects of dumped imports, including the effects of dumped imports on the merchant market, as well as on the industry as a whole. This scheme does not in any way place emphasis on the merchant market segment over the entire industry. Nor does it have anything whatsoever to do with the weight given to any factor. In fact, in the determination in this case, the significance of the consideration of the merchant market followed by the industry as a whole was not lost on the Commissioners. Notably, Commissioner Bragg took exception to this order of consideration --

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earnings estimates for the third and fourth quarters.")**(Exh. US/B-40(b))**; *Metal Bulletin* at 33 (Sept. 7, 1998) ("Nucor has cut production . . . in response to low market prices . . . because of market turmoil in the wake of a flood of cheap imports.)**(Exh. US/B-40(b))**; *Paine Webber - Metal Stock Strategies* (Sept. 8, 1998) ("Prices in many cases are now below the marginal cost of many producers. The 'death spiral,' which in our view is sure to extinguish some present and planned steelmaking capacity, is in full force.")**(Exh. US/B-40(b))**; *Wall Street Transcript Corporation - Industry Report* (July 20, 1998) ("Imports were simply so large, and prices at which they entered markets so low, that steel pricing was compromised. . . . Further, the prices at which these products are being offered continues to erode the pricing outlook for domestic steel.")**(Exh. US/B-40(b))**. All of the cited newspaper articles are on the Department's administrative record.

not to the weight that the other Commissioners in the majority were placing on the merchant market segment.[6]

31. Moreover, Japan's apparent preference for the "shall consider" over the "shall focus primarily" language is also misplaced. As the USITC found, in accordance with the statements in the Statement of Administrative Action, by using the "shall focus primarily" language, Congress has required the USITC to consider both the merchant market segment and the entire industry in its examination of certain factors. "Shall consider," without any description of how the consideration is to take place (*i.e.* primarily), would leave open the possibility that an authority could consider the merchant market exclusively. Congress removed this potential ambiguity by stating that the USITC "shall focus primarily" on the merchant market and thus provided a more precise structure than that proposed in the Japanese language.

Question 23. Even if the word "primarily" connotes more than one item of focus, [what] does the term mean about the relevant weight to be assigned the various areas of focus.

32. The captive production provision has no bearing on the weight that the USITC assigns to each factor. Commissioners assign weight to each factor based on the facts of the case before them. Article 3.4 of the Antidumping Agreement provides that no "one or several of these factors [can] necessarily give decisive guidance." In keeping with this provision, 19 U.S.C. § 1677(7)(E)(ii), states that "the presence or absence of any factor which the Commission is required to evaluate . . . shall not necessarily give decisive guidance with respect to the determination of the Commission . . ." The captive production provision does not inject into the impact section of the statute any new obligations that would dictate the weight to be given to any particular factor. The captive production provision merely calls for an extra step in the evaluation of certain of the factors listed in the impact section of the statute before those factors are weighed with all other factors. Thus, it does not disturb the overarching principle, articulated in both the statute and the Anti-dumping Agreement, that the weights to be assigned to each factor are determined by the Commissioners on a case-by-case basis.

Question 24. In para 34 of its oral statement, the U.S. alludes to a two step approach. In light of the statutory requirement to "focus primarily" on the merchant market for market share and financial performance, could the U.S. clarify the relative weight to be assigned to each step in the analysis?

33. As stated above, the captive production provision merely interposes into the statutory scheme an additional requirement to consider certain factors as they relate to the merchant market as well as the entire industry. It does not intervene in the assessment of relative weights that the Commissioners are to assign to any factors.

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[6] *See, e.g.* USITC Views at nn. 59, 75.

Question 25. How does the USG justify giving primary focus to the merchant market concept of "sales" at the expense of other factors such as overall domestic industry concept of "output?"

34. The United States does not systematically look at any factor listed in the Anti-Dumping Agreement or the U.S. statute "at the expense of" any other factor. The Commissioners place emphasis on the various factors based on the facts of each case.

35. In fact, it is Japan that argues for an approach that would systematically emphasize one factor "at the expense of" another. As we have argued extensively in our first written submission, sales occur in the merchant market. In recognition of that fact, the captive production provision provides for an analysis of the merchant market to capture the effect that dumped imports are having on sales. Without such a focus on the merchant market, the USITC would be limited to evaluating only domestic producers' output (transfers plus sales) and would ignore the effects of dumped imports on sales.

Question 26. Where does the USITC explain the way in which it resolved the inconsistent trends in operating profit over the 1996-98 period between the industry overall and the merchant market only?

36. The USITC was not required to resolve any inconsistent trends in the data. Under Article 3.4 of the Anti-dumping Agreement, the USITC only had an obligation to consider all relevant economic factors bearing on the state of the industry. The USITC considered the operating profits for the 1996 to 1998 period for the merchant market and the entire industry.[7] Thus, the USITC satisfied its obligations under the Agreement.

Question 27. In footnote 157 of its submission, the USG accuses Japan of not being clear what "factor" of financial performance it means. How does the USG address the fact that the operating income ratio for the domestic industry as a whole in 1998 exceeded that of 1996, even after the increase in imports?

37. Again, the USITC is not required to address every fact bearing on each factor. It is charged with examining relevant economic factors to assess injury. The USITC satisfied this requirement. The USITC looked at three year trends and noticed that during the last two years of the period, when apparent consumption increased to record heights, operating income and the

[7] It looked at and compared the domestic industry's declines in the unit costs of goods sold and the unit values for the like product in the merchant market and the industry as a whole over the entire period. USITC Views at 16 n.88. It then also referred back to this discussion in its analysis of the impact of dumped imports on the domestic industry. USITC Views at 18 n.99.

ratio of operating income to net sales declined. It explained this anomalous situation based on declining unit values and shipments over this period.[8]

38. Japan takes issue with the fact that the USITC did not discuss the ratio of operating income to net sales for 1996 (as stated above, the USITC did address the operating income for 1996). The USITC, however, considered the ratio of operating income to net sales in light of the trends from 1996 to 1998 and noticed that the data for 1997 to 1998, in particular, posed a question that needed to be resolved. A comparison of 1996 to 1998 data does not respond to this question. It is true that a comparison of 1996 to 1998 data, alone, without consideration of 1997 data, would show an increase in the ratio of operating income to net sales for the entire domestic industry, as Japan suggests. This trend over the entire period does not mandate a negative determination, however. As the panel found in *Argentine-- Footwear*,[9] simply because one indicator follows a trend different than other factors does not mean that the USITC's injury determination is fatally flawed. Moreover, the USITC made no finding that the domestic industry was healthy in 1996. As a result, this panel should not be swayed by Japan's focus on the changes from 1996 to 1998. It is possible (although the USITC made no findings to this fact) that the USITC would have found the domestic industry performing poorly in 1996 *and* 1998. Because the USITC did not have to resolve this question to reach its material injury determination, Japan's arguments are misplaced. Further, it is clear that the USITC found that falling back towards the 1996 level was unacceptable and a sign of injury when aggregate demand was substantially higher in 1998 than 1996. Thus, in that sense, the comparison that Japan seeks in fact occurred. The USITC had a particular concern with the data from 1997 to 1998 and it addressed that concern in its determination. The USITC performed a well-reasoned analysis, considered all the factors, and paid particular attention to the seemingly anomalous occurrence of poor performance by the domestic industry at a time of increasing consumption.

Question 28. Since USITC analyzed a three-year trend in profitability in the 1993 case, why did the USITC consider only a two-year trend in the current case?

39. Japan mischaracterizes the USITC's determinations in both the 1993 *Flat Rolled Steel* investigation and the current case. As noted above, in the current hot rolled investigation, the USITC considered the profitability of the domestic industry over the three year period[10] but then provided an extensive discussion of the 1998 anomaly. Simply because the USITC looked for an explanation for why, from 1997 to 1998, apparent consumption increased but the domestic

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[8] USITC Views at 18.

[9] Appellate Body Report, *Argentina -- Safeguard Measures on Imports of Footwear* ("*Argentina -- Footwear*"), WT/DS121/8, adopted Dec. 14, 1999 at para. 139.

[10] USITC Views at 16 n.88 and 18 n.100 (comparing unit costs of goods sold to unit values).

industry performed worse does not mean that the USITC ignored, or in any way failed to consider, the data for 1996, especially in light of the discussion of the 1996 data that is apparent on the face of the determination. As to the *Flat Rolled Steel* determination, Japan correctly points out that the USITC considered three year trends, but it fails to mention that the USITC also considered trends within that period.[11] The USITC compared data from year-to-year within the period in both investigations.

40. Japan's repeated reliance on the *1993 Flat Rolled Steel* case is misplaced. Each investigation turns on its own record facts and the USITC's determinations are *sui generis*. Although the two investigations deal with the same or similar products, as explained in detail in our first written submission, the facts presented to the USITC during each investigation are very different. In particular, for example, in the 1993 investigation, the USITC found that domestic apparent consumption, production, and shipments all followed the same trends -- decreasing and then increasing over the period of investigation. As already noted, in the current investigation, the USITC had to address the fact that, while U.S. apparent consumption was increasing to record heights, the U.S. producers' production, shipments, and market share were declining. These facts were not present in the *1993 Flat Rolled Steel* investigation. Therefore, the analyses in the two cases had to be different. The USITC could not simply ignore the facts of the investigation before it and perform a rote analysis based on the record in an investigation six years earlier.

Question 29. Where does the USITC decision address the price trends in non-subject imports? What evidence is there that the USITC even collected any information on non-subject import price trends?

41. Nonsubject imports are relevant to the causation analysis articulated in Article 3.5 of Anti-dumping Agreement only as they pertain to the proscription against attributing injury from other causes to dumped imports. That provision requires authorities to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" so that injury from other causes should not be attributed to the dumped imports. A factor which Article 3.5 states *may* be relevant to this analysis is the "volume and prices of imports not sold at dumping prices."

42. The USITC examined the effects of nonsubject imports. It noted that "[i]mports from nonsubject countries maintained a stable presence in the U.S. market throughout the period

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[11] *Certain Flat Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609 and 612-619 (Final), USITC Pub. 2664 (August 1993) ("*1993Hot Rolled Steel*") at 52-53 (**Exh. Jpn-59**) .

examined."[12] It thus satisfied the requirement to examine any known factors injuring the domestic industry. With an "essentially flat" market share, at a time when subject imports were rising sharply, nonsubject imports were not responsible for the decreasing market share of the domestic industry.[13] If the price effects attributed to the dumped imports were in actuality from the nonsubject imports, then it would be expected that those nonsubject imports would be entering the United States and sold to purchasers in the same quantities as the dumped imports and capturing an increasing market share in the same way as well. Thus, the USITC's findings on volume accounted for the risk that the Commission could have mistaken the price effects of nonsubject imports for the effects of dumped imports.

43. The USITC does not collect pricing data for nonsubject imports in the same way that it collects pricing information for dumped imports. As opposed to the product-by-product prices that the USITC staff gathered for dumped imports, the USITC collected information on the value of nonsubject imports.[14] This different approach to data collection stems from the different issues that the USITC resolves with respect to prices of dumped imports and prices of nonsubject imports. With respect to dumped imports, the USITC must determine whether they are having price effects on the domestic industry by specifically considering, pursuant to Article 3.2 of the Anti-dumping Agreement, whether the dumped imports undersold the domestic like product and whether the dumped imports caused price suppression or depression of the domestic product. This analysis requires, by its own terms, a detailed price analysis. As to nonsubject imports, the USITC must not attribute any injury caused by nonsubject imports to the dumped imports pursuant to Article 3.5. Such detailed price comparisons as are needed for dumped imports are therefore not required in the context of nonsubject imports.

Question 30. Why did the USDOC not correct the NKK clerical error? Can the USDOC identify any other examples of failing to correct properly alleged clerical errors?

44. As we explained in our first submission at paragraphs 28-29, Part A, and paragraph 14, Part D, Commerce's failure to correct NKK's clerical error at the preliminary determination stage was an oversight subsequently corrected in the final determination. Such an oversight is not without precedent in Commerce practice. For example, in *Certain Stainless Steel Wire Rods from France, Amended Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 47169 (Aug. 30, 1999), www.ia.ita.doc.gov/frn/index.html, Commerce corrected respondents' alleged clerical errors regarding the final results, but failed to correct petitioners' alleged errors. When petitioners drew this oversight to Commerce's attention, Commerce subsequently

[12] USITC Views at 10.

[13] USITC Views at 11.

[14] USITC Views at IV-11.

corrected their errors as well. In *Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation, Final Determination of Sales at Less Than Fair Value,* 65 Fed. Reg. 42669 (July 11, 2000), Commerce did not correct a respondent's alleged clerical errors at the preliminary determination stage. It did, however, correct one of the errors in the final determination. Just as the oversights in these cases in initially failing to correct clerical errors do not reflect any evidence of bias on Commerce's part, the oversight in the instant case also does not reflect any evidence of bias.